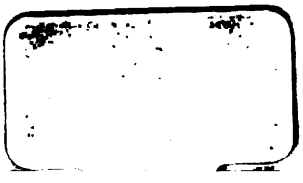

CASES

DECIDED IN

THE COURT OF SESSION,

FROM

NOVEMBER 12, 1822, TO MARCH 11, 1824,

REPORTED BY

PATRICK SHAW AND ALEX. DUNLOP JUN.
ESQUIRES, ADVOCATES.

VOL. II.

EDINBURGH:
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1824.

Abernethy & Walker, Printers, Edinburgh.

JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President Hope.
Lord Hermand.
Lord Succoth.
Lord Balgray.
Lord Gillies.

PERMANENT LORDS ORDINARY.

Lord Alloway.
Lord Meadowbank.

SECOND DIVISION.

Lord Justice-Clerk Boyle.
Lord Glenlee.
Lord Bannatyne, (who resigned, and was succeeded by Lord Pitmilly, Nov. 1823).
Lord Robertson.
Lord Craigie.

PERMANENT LORDS ORDINARY.

Lord PITMILLY, (who having been appointed to the Inner-House, was succeeded by Lord MACKENZIE).
Lord CRINGLETIE.

LORD ORDINARY ON THE BILLS.

Lord KINEDDER, (who having died August 1823, was succeeded by Lord MACKENZIE, who having been appointed a Permanent Lord Ordinary, was succeeded by Lord ELDIN, Nov. 1823).

MATHEW ROSS, Esquire, Dean of Faculty, (who having died was succeeded by GEORGE CRANSTOUN, Esquire, Nov. 1823).
Sir WILLIAM RAE, Lord Advocate.
JOHN HOPE, Esquire, Solicitor-General.

THE CASES

DECIDED IN

THE COURT OF SESSION,

WINTER 1822–1823.

M. G. and E. J. TURNBULLS, Pursuers.—*Moncreiff—Cockburn—Sandford.*
Mrs. TURNBULL'S TRUSTEES, Defenders.—*Baird—Tawse.*

No. 1.

Nov. 12, 1822.

SECOND DIVISION.
Lord Cringletie.
B.

Fee—Trust-Disposition.—By contract of marriage, Mrs. Turnbull disponed certain heritable subjects, of which she was fiar, to herself and husband, in liferent, and to the children of the marriage, in fee. Having afterwards sold these subjects, and bought other lands with the price, she took the disposition to herself and husband, and longest liver in liferent, and to her children, the pursuers, nominatim, and their heirs and assignees in fee, excluding her husband's jus mariti, and reserving to herself power to burden and dispose of the property. In 1804, she executed a trust-deed in favour of the defenders, for these purposes,—1. To pay off all debts

contracted by her previous to the date of the trust. 2. To pay to her the surplus rents; and, 3. After the death of herself and husband, 'to dispone and 'convey the free residue of the property herein-be-'fore conveyed, or to apply the proceeds thereof to 'the use and behoof' of the pursuers, in such shares as she, by a writing under her hand, might direct, or, failing such writing, equally between them. On this disposition the defenders were infeft; and having, in the course of their management, made considerable advances for behoof of Mrs. Turnbull, she, in 1806, executed a supplementary trust-deed, confirming the former one, and further declaring, that the same was granted for payment of such of her and her husband's debts 'as have already been paid or may hereafter 'be paid' by the trustees, and especially for payment of the advances already made by them. The defenders continued to manage the property, making still farther advances in paying debts contracted by Mrs. Turnbull, till 1819, when her daughters raised the present action, to have the supplementary trust-deed of 1806 reduced, on the ground, 1. That by the original disposition, the fee of the lands was vested in them; and, 2. That, at any rate, the trust-deed of 1804 divested Mrs. Turnbull, and vested the fee in them. The Lord Ordinary found, that the fee of the residue was, by the trust-deed of 1804, vested in the trustees for behoof of the pursuers, and that it could not be impaired without their consent, and he, accordingly, reduced the supplementary trust-deed under challenge. But the Court held, 1. That, previous to executing the trust-deed of 1804, Mrs. Turnbull was absolute fiar of the property; and, 2. That that deed made no alteration in her right; and,

therefore, they repelled the reasons of reduction, and assoilzied the trustees.

Pursuers Authorities.—(1.) M'Intosh, Jan. 28, 1812, (F. C.); (2.) Corners v. Wilson, 1781, (Not rep.); Seton, March 6, 1793, (4219.)
Defenders Authorities.—(1.) 3. Ersk. 8, 35; (2.) Campbell of Edderline's Creditors, Jan. 14, 1801, (App. Adjudication, No. 11); Lockart, Feb. 19, 1819, (F. C.) and Cases in Dict. vol. ii, p. 148.

W. Jameson, W. S.—C. Tawse, W. S.—Agents.

No. 2.

J. Innes, Suspender.—*Cranstoun—Skene.*
Duke of Gordon, Charger.—*Moncreiff—H. Lumsden—Robertson.*

Nov. 13, 1822.

First Division.
Lord Alloway.
D.

Heir and Executor.—The late Earl of Peterborough, on the 28th of August 1794, granted a lease to Russel, of the entailed estate of Durris, for seventy-six years, from Whitsunday 1794. The rent, during the life of the Earl, was to be £300, payable 'at two 'terms in the year, Martinmas and Whitsunday, by 'equal portions, beginning the first term's payment 'thereof at the term of Martinmas, in the present 'year 1794;' but, on his decease, it was to be £1,000, payable 'at the two terms aforesaid, by 'equal portions, beginning the first payment at the 'term of Whitsunday, or the term of Martinmas, 'that shall next immediately follow the death' of his Lordship. This lease was assigned by Russel to Innes. The Earl died in June 1814, and the succeeding heir of entail charged Innes to pay to him the rent due at Whitsunday 1814. He suspended, on the ground, inter alia, that this rent belonged to the Earl's executors. The Lord Ordinary sustained this plea, in respect 'that the first half-year's rent

'for crop 1814 was conventionally due at Martinmas '1814,—that the Earl of Peterborough died in June '1814; and having, therefore, survived the legal 'term of Whitsunday, he transmitted to his execu- 'tors, or representatives, the rent legally due at 'Whitsunday, although not conventionally due till 'Martinmas.' The Court refused two petitions, without answers.

Charger's Authorities.—2. Ersk. 9, 64; Kames Elucid. Art. 9; Bell on Leases, 379.

T. INNES, W. S.—J. S. ROBERTSON, W. S.—Agents.

No. 3.

D. M'DONALD, Pursuer.—*M'Niell.*
A. M'KENZIE, Defender.—*Forbes.*

Nov. 13, 1822.

FIRST DIVISION. Lord Alloway. D.

Decree in Absence or in Foro—A. S. Feb. 7, 1810.—M'Donald, having entrusted certain title-deeds to M'Kenzie, a writer, who lost them, raised action against him to replace them, and for damages. The summons was taken to see, but no defences were returned; and, in consequence of an agreement between the parties, M'Donald restricted his conclusions to the expences of making up new titles. The Lord Ordinary, (22d June 1820), in absence of M'Kenzie, decerned against him accordingly; and remitted the account of these expences to the auditor, to be taxed. The process then fell asleep; but was wakened, and the remit renewed, under a joint minute by the counsel and agents of both parties, and in their presence. M'Kenzie, attended by his agent, at the taxing of the accounts, lodged objections to them, and was heard by his counsel at the bar. Before, however, they were advised, he prayed to be reponed against

the decree of 22d June 1820, alleging, that it was pronounced in absence, and tendered the previous expences. This the Lord Ordinary refused, 'in respect 'that it is expressly averred that the pursuer departed from his claim of damages, and put in a minute restricting his claim to expences, in consequence of a transaction or understanding betwixt the parties; and that this agreement is not expressly denied by the representer, (M'Kenzie); and, in respect that the process was wakened by a minute subscribed both by the counsel and agent for the representer, in which they consented to the same being proceeded in, as if it had never been asleep; and in virtue of this consent, and when the counsel for both parties were present, the accounts were again ordered to be lodged, and remitted to the auditor to be taxed, and a variety of procedure took place betwixt the parties, both before the auditor, and before the Lord Ordinary; and that these proceedings seem to preclude the plea of a decree in absence.' The Court adhered.

Defender's Authorities.—4. Stair, i, 69; 4. Stair, 40, 8; Milne, Nov. 27, 1801, (12176.)

N. M'Donald, W. S.—W. M'Kenzie, W. S.—Agents.

J. Gordon, Petitioner.—*Shaw.*

No. 4.

Nov. 13, 1822.

Second Division.

M'K.

Bankrupt—Sequestration—Discharge.—The petitioner's estate having been sequestrated, he paid a small dividend: one of his friends offered the creditors a shilling per pound additional, on condition of their concurring in this application for discharge. The Court had at first some doubts as to the com-

petency, where the concurrence of the creditors had been so obtained; but, in respect of the precedents, they granted the discharge.

Authorities—Stewart, July 2, 1811; A. Bell, March 11, 1815; J. Hall, March 11, 1815; R. Monach, Jan. 26, 1816; 2. Bell, 478.

PH. DANIEL, W. S.—Agent.

No. 5. DUKE of BUCCLEUCH & QUEENSBERRY, Pursuer.—*Jeffrey—Forbes—Maconochie.*
J. HYSLOP, Defender.—*Moncreiff—Whigham.*

Nov. 13, 1822.

SECOND DIVISION. Lord Cringletie. F.

Violent Profits—Bona Fides—Lease.—The entail of the Queensberry estates, executed in 1705, prohibited the letting of leases 'for any longer space than 'the setter's lifetime, or for nineteen years, and that 'without diminution of the rental, at the least, at 'the just avail for the time.' It had been the constant practice of the heirs possessing under this entail, from the period of its execution, to let leases for grassums. This was continued by William, late Duke of Queensberry, who, at his death, in 1810, left the whole of the estate under such leases, and, among others, the defender's lease of the lands of Halscar. In 1814, the late Duke Charles William succeeded, and instituted actions concluding for reduction of the several leases, and for violent profits, from the death of William Duke of Queensberry, so long as the tenants should remain in possession.

The defender's lease was chosen as the one in which to try the question, and the Court, (May 7, 1816), unanimously assoilzied him from the conclusions of reduction. On appeal, the cause was remitted back, (July 10, 1817), for reconsideration;

and the Court, a second time, sustained the defences, and repelled the reasons of reduction. The pursuer again appealed, when the House of Lords, (12th July 1819), pronounced a judgment reversing the decisions of the Court, and finding, 'that the late 'Duke of Queensberry had not power, under the en- 'tail founded on by the parties in this cause, to grant 'the tack in question, the same having been grant- 'ed upon the surrender or renunciation of a former 'tack, then unexpired; and which former tack had 'been granted by the Duke at the same rent, and 'also for a sum or price received by him;' 'and, 'therefore, that this tack ought to be considered as 'let with diminution of the rental, and not for the 'just avail;' and further remitting the cause back to this Court. This judgment came to be applied, when the Court pronounced an interlocutor, (February 29, 1820), reducing the defender's lease, which was affirmed on appeal, (July 2, 1821). The case having returned to the Lord Ordinary to determine on the conclusion for violent profits, his Lordship pronounced this interlocutor.—'Finds, that the de- 'fender, John Hyslop, ought to be considered as 'having possessed his farm on a lease which he was 'in *bona fide* to consider legal and valid, until the 'judgment of the House of Lords in July 1819; but 'that, after that period, he having been certiorated 'by that judgment that his lease could not be sus- 'tained as it thus stood, although it was not finally 'reduced till a later period, he was a *mala fide* pos- 'sessor in virtue of said lease; and, therefore, is li- 'able for such rent as the farm could reasonably en- 'able a tenant to pay, from and after Martinmas in 'said year 1819; and, *quoad ultra*, assoilzies the

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J. HYSLOP, Defend

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'said defender from the demand of violent profits.' Both parties reclaimed:—The pursuer contending, that the tenant should be held to have been in *mala fide* during his whole possession, as having been participant in a fraud against the entail, or, at least, from the date of citation in the action of reduction:—And the defender pleading, that he ought not to be subjected in payment of violent profits until after the date of the judgment actually reducing his lease. To this interlocutor the Court, however, adhered.

The Judges were of opinion, that the defender was *in bona fide* in accepting his lease, though granted in consideration of a grassum, and that he could have no cause to doubt of its validity, until the judgment of the house of Lords, (July 12, 1819), was pronounced; but that although that judgment did not actually reduce his tack, yet it laid down principles which necessarily implied that it was invalid, and, therefore, put him *in mala fide* to continue his possession.

Pursuer's Authorities.—12. Voet, i, 29–31; 2. Stair, i, 23; 2. Ersk. i, 25–28–29; Grant. Nov. 16, 1633, (1748); Cuningham, Feb. 19, 1635, (1738); Gray, Feb. 23, 1672, (1755); Foumarton, July 15, 1675, (1755); Oliphant, Nov. 30, 1790, (1721.)

Defender's Authorities.—2. Stair, i, 24, 29, and xii, 7; Bonny, July 30, 1760, (1728); Leslie Grant, Feb. 9, 1765, (1760); Bowman, June 11, 1805; (App. 1, B. and M. Fides, No. 4); Duke of Roxburgh, Feb. 17, 1815, (F. C.); Turner, March 3, 1820. (F. C).

J. Home, W. S.—Alex. Goldie, W. S.—Agents.

No. 6.

John Hyslop, Pursuer.—*Moncreiff—Whigham.* Duke of Queensberry's Executors, Defenders.—*Clerk—Irving—Cockburn.*

Nov. 13, 1822.

Second Division. Lord Cringletie. F.

Relief—Warrandice—Landlord and Tenant—Lis Alibi.—William late Duke of Queensberry granted

to Hyslop a lease of the lands of Halscar, for nineteen years from Whitsunday 1803, and warranted the lease 'at all hands, and against all mortals.' The Duke of Buccleuch having, in 1814, raised actions of reduction of this and the other leases on the Queensberry estate, the several tenants immediately thereupon instituted actions of relief against the late Duke of Queensberry's executors, on the warrandice in their tacks; and, at the same time, lodged claims in Chancery to have certain funds belonging to the late Duke set apart to answer any demands they might substantiate against the defenders in the event of their leases being ultimately reduced. Hyslop's lease having been reduced, (see preceding case), he insisted in the action of relief. In defence, it was, inter alia, pleaded, 1. That the claim lodged in Chancery constituted a lis alibi pendens. 2. That the warrandice applied only to actual eviction, and that Hyslop had possessed till the expiry of his lease; and, 3. That the action was premature, no violent profits having been finally found due by Hyslop.

The Lord Ordinary found 'the defenders liable to 'the pursuer in relief, and appointed the pursuer to 'put in a condescendence of his claims.' And the Court adhered.

Their Lordships held, 1. That the claim lodged in Chancery was a mere *caveat*, and not of the nature of a lis alibi pendens.—2. That the warrandice extended to the *distress* suffered by Hyslop, through want of title on the part of the granter, although no eviction had actually taken place; and, 3. That he was entitled to have the general principle of the defender's liability determined, even although the amount claimable had not been ascertained.

Pursuer's Authorities.—(1.) Cuninghame, Feb. 27, 1705, (8284); Mures, Jan. 2, 1728, (8290); Coutts & Co. March 8, 1769, (8292); May, June 25, 1799, (8293); (2.) 2. Erak. iii, 30; 2. Stair, iii, 46; (3.) E. of Home, Jan. 21, 1663, (16384.)

A. Goldie, W. S.—W. Lawrie,—Agents.

No. 7. **Duke of Buccleuch and Queensberry, &c. Pursuers.**—*Jeffrey—Forbes—Maconochie.*
Executors of Duke of Queensberry, Defenders.—*Clerk—Irving.*

Nov. 13, 1822.

Second Division. Lord Cringletie. F.

Entail—Damage and Interest.—This was an action connected with those immediately preceding. The leases granted by the late Duke of Queensberry, on the entailed estate of Queensberry, having been reduced, as in contravention of the entail, by being let for grassums, the Duke of Buccleuch, the heir now in possession, raised an action for reparation of the damages thus occasioned. The Lord Ordinary assoilzied 'the defenders from the claim for damages, 'reserving entire to the pursuers to claim from the 'defenders the whole or part of the grassums taken 'and received by the late William Duke of Queensberry from his tenants, and to the defenders their 'defences, as accords;' and the Court adhered.

It was observed, that although the act of the Duke of Queensberry, in granting the leases, might subject him in reparation of the damage occasioned by the wrong done by him, (which, however, some of their Lordships doubted), yet the act 1685, having provided only one remedy to substitute heirs of tailzie, in the event of contravention by the heir in possession, viz. by a declarator of contravention and irritancy, and the heir in this case not having adopted that remedy in the lifetime of the contravener, he could

not now be allowed to insist for reparation against the representatives of the contravener, when they were deprived by his death of the privilege of purgation, which he could have exercised, had the proper remedy been adopted during his lifetime.*

Pursuers Authorities.—1. Bank. 580; 2. Stair, iii, 59; 3. Ersk. 31, 36, and viii, 23; Earl of Callender, June 23, 1687, (14578); Lady Riddoch, March 11, 1707, (15489); Creditors of Riccartoun, June 13, 1712, (15494); Baillie, July 11, 1734, (15509); Cumming, July 29, 1761, (15513.)

Defenders Authorities.—Bruce, Jan. 15, 1729, (15539); Lockart v. Sir James Steuart, June 8, 1809, (Not rep.)

J. Home, W. S.—W. Lawrie,—Agents.

A. Kay, Suspender.—*Grahame.* No. 8.
G. Coates and Mandatory.—*Jameson.*

Nov. 14, 1822.

First Division.
Bill-Chamber.
Lord Kinedder.
H.

Bankrupt—Summary Diligence pending Application for Discharge.—Kay, a sequestrated bankrupt, having been charged for payment of a debt due to Coates, presented a bill of suspension, without caution or consignation, on the ground, chiefly, that he had applied for a discharge, which was under discussion, and that diligence ought not, in the meanwhile, to be allowed to proceed. The Lord Ordinary refused the bill; and the Court adhered.

T. Grahame, W. S.—D. Brown, W. S.—Agents.

G. Dunlop, W. S. Complainer.—*Cranstoun—Moncreiff—Hope.* No. 9.
J. Hay, Respondent.—*Jeffrey—Murray—Blackwell—Pyper.*

Nov. 14, 1822.

First Division.
H.

Court Caption—Process.—Mr. Dunlop presented a petition and complaint against Mr. Hay, assistant to

* Leave was subsequently given to appeal the three preceding cases.

one of the depute-clerks of Session, complaining, that, on the 25th of February 1821, he had borrowed, by means of his clerk, from Mr. Hay, and given his receipt for certain papers in a depending process; that he restored these papers on the 26th of November, and paid the usual fee for scoring the receipt; that, notwithstanding, Mr. Hay did not delete the receipt, and, under it, obtained a caption against him, in general terms, 'for not returning part of the process;' that although the caption was afterwards made more specific, yet that it included one of the papers which confessedly had been returned; and that, on this caption, he had been apprehended. Mr. Hay admitted, that a few of the papers had been redelivered to him,—that he had got the fee,—and that the receipt had not been scored; but denied that all the papers had been restored, and maintained, that he was not bound to score the receipt until this had been done. The Court found, 'that the conduct of the respondent, in 'not scoring the receipt in question, was irregular; 'but, in respect of the equal irregularity in the com-'plainer's clerk, whose duty it was to have compar-'ed the process with the inventory, in presence of 'the clerk, and to have seen the receipt scored, they 'dismiss the petition and complaint, assoilzie the re-'spondent from the conclusions, and decern; but 'find expences due to neither party.'

It was observed, that where a part of a process is returned, the clerk ought to expunge the original receipt, and take a new one for those papers which are retained.

D. Fisher—J. Lang, W. S.—Agents.

H. STEWART, Suspender.—*Clerk—Moncreiff—Maitland.*
J. S. BIRD, Charger.—*Cuninghame—Dundas.*

No. 10.

Nov. 14, 1822.

FIRST DIVISION.
Bill-Chamber.
Lord Kinedder.
H.

Bill of Exchange—Vitiation.—Stewart, acceptor of a bill, dated 14th March 1821, was charged by Bird, an indorsee, to pay it. He suspended, on the allegation that the bill, when accepted by him, was dated 4th March, and had been afterwards altered to 14th March. The bill was ex facie unexceptionable; and the Lord Ordinary, in respect thereof, and that the signature was admitted to be genuine, refused the bill. In a reclaiming petition, an offer was made to prove that Bird was in the knowledge of the vitiation when the bill was indorsed to him; but as this was vague and general, and no evidence was shewn to support the alleged vitiation, the Court adhered.

Suspender's Authorities.—(1.)—1. Bell, 304; Merchie, July 1, 1796, (1458); Bryce, Nov. 16, 1810, (F. C.); Chitty, 84; Masters, 4. T. R. 320; Calvert, 2. Blackst. Rep. 141; 3. Camp. N. P. 343; Outhwaite, 4. Camp. N. P. 179; 4. Ersk. 2, 21; Neilson, Feb. 14, 1734, (1685); Farquhar, Dec. 16, 1757, (12341); 2. Neilson, Jan. 25, 1740, (5907); Stewart, Feb. 18, 1741, (9510.)

Charger's Authorities.—1. Bell, 304, and cases there referred to; Graham, Jan. 27, 1795, (1453.)

V. HATHORN, W. S.—GREIG & PEDDIE, W. S.—Agents.

Captain W. M'KESSOCK, Suspender and Pursuer.—*Moncreiff—Skene.*
J. DREW, Charger and Defender.—*Baird.*

No. 11.

Nov. 14, 1822.

FIRST DIVISION.
Lord Alloway.
S.

Submission—Arbiter.—M'Kessock brought a suspension and reduction of an interim and final decree-

arbitral, on the grounds, 1. That as there was no power of prorogation in the submission, the interim-decree, which did not exhaust the matters at issue, was inept; and that the final decree was equally so, as it had been pronounced after the lapse of a year; 2. That since the date of the submission, he had discovered that Drew, who was then insolvent, was indebted £20 to a company, of which one of the arbiters was a partner; and that as he had thus an interest to increase Drew's funds, he was incapacitated from acting as a judge. In relation to this last plea, Drew alleged that the arbiter had only a fourth share in the company, and to that extent the debt was compensated by a counter-claim against him. The Lord Ordinary, after suspending and reducing the final decree-arbitral, turned it into a libel, to the effect of allowing a reference to oath, and found, 'that the claim upon which the interest of the arbiter is founded was not made until two years after the submission was entered into, and that no circumstances are mentioned, from which it appears, that, at the time when the interim-decree was pronounced, the arbiter was even acquainted with the very small interest which he had, as a partner of a company who were creditors of Drew: and, besides, from the counter-claims of compensation, it is not at all clear that he, even at any time, had an interest.' His Lordship, therefore, assoilzied Drew as to the interim-decree, found the letters orderly proceeded, and, in respect of his oath, decerned for the sum contained in the final decree. To this interlocutor the Court adhered.

Suspender's Authority.—2.—Elliot, Dec. 15, 1789, (668).

M'Millan & Grant, W. S.—J. R. Skinner, W. S.—Agents.

JAMES M'DONNELL, Assignee of W. M'EWAN, W.S. Pursuer.—*Moncreiff—Matheson.*
JAMES GRAHAM and CURATOR, Defenders.—*Cockburn—Christison.*

No. 12.

Nov. 14, 1822.

SECOND DIVISION. Lord Cringletie. F.

Expences.—In an action at M'Donnell's instance, for payment of the balance due on certain tutorial accounts, objections were sustained to a few items; but the greatest part was ultimately found due.—The Lord Ordinary found the defenders liable in modified expences, disallowing the expences on those points in which the pursuers were unsuccessful, and awarding to the defender an equal sum as his expences of that part of the procedure.—The Court adhered.

JAS. M'DONELL, W.S.—W. RENNY, W.S.—Agents.

T. BRUMBY and Others, Pursuers.—*Forsyth.*
JOHN OGLE, Defender.—*Cuninghame.*

No. 13.

Nov. 14, 1822.

SECOND DIVISION. Lord Pitmilly. B.

Expences.—*Stat.* 48, *George III*, *c.* 151.—In an action of count and reckoning, Ogle, by inadvertency, allowed an interlocutor of the Lord Ordinary against him, to become final. He was reponed, on paying to the pursuers all their previous expences, in terms of § 16. of the 48. Geo. III, c. 151.—Ogle was ultimately successful on the merits, and the Court found the pursuers liable in expences, and (by a majority) ordained them to repeat those expences which had been paid by the defender to obtain himself reponed against the Lord Ordinary's interlocutor. A re-

claiming petition against this decerniture was held to be competent; but the Court adhered.

H. WATSON, W. S.—J. TWEEDIE, W. S.—Agents.

See v. G. p. 488

No. 14. W. MILLER, Suspender.—*H. Lumsden.*
D. CHISHOLM, Charger.—*Hunter.*

Nov. 15, 1822.

FIRST DIVISION.
Lord Meadowbank.
H.

A. S. August 11, 1787—*Expences—Process.*—A suspension of a decree in absence for a sum below £12, having been passed, and the letters expede, the Lord Ordinary remitted to the inferior court, with instructions to try certain objections to its jurisdiction, and to proceed as should be just; but refused expences to the charger. He reclaimed, and insisted, that, by A. S. 11th August 1788, the bill ought to have been refused, and remitted to the inferior judge, to hear the suspender, on payment of the previous expences; and, consequently, that, as the irregularity of passing the bill had been occasioned by the suspender, he ought to pay the expences in the Supreme Court.—The Court so far recalled the Lord Ordinary's interlocutor, as to remit to decern for these expences, if seen fit.

J. ANDERSON, W. S.—R. M'KENZIE, W. S.—Agents.

No. 15. CAMPBELL and CLASON, Claimants.—*Moncreiff—Jameson.*
A. GOLDIE, (Common Agent in Ranking of Parton), Respondent.—*Fullerton—Whigham.*

Nov. 15, 1822.

FIRST DIVISION.
Lord Alloway.
S.

Writer's Hypothec.—The late Mr. Glendonwyn, by a minute of sale, disponed his estate to Scott, under

the burden of the price. Having died before executing a disposition, the sale was attempted to be set aside by his eldest daughter, as heir of the investiture; but her pretensions were repelled, and she, with her sisters, as heirs-portioners, was obliged to grant a title to Scott. The price was 'expressly de-'clared to be a real burden affecting the whole sub-'jects before disponed,' and seisin was taken accordingly, and recorded. Scott placed the title-deeds in the hands of Campbell and Clason, W. S., who had acted as his law-agents in the action for enforcing the minute of sale. He afterwards became insolvent, and a ranking and sale of the estate was brought by one of the representatives of Glendonwyn, as a creditor under the reserved burden. After a proof of the value of the lands, but, prior to the appointment of a common agent, Campbell and Clason were required to produce the title-deeds. Against this they pleaded their lien, and declined to deliver them up till secured in a preference for the debt due to them. The Lord Ordinary, 'in respect that the title-deeds called for are in 'possession of Campbell and Clason, W. S., who state 'that they hold them in security of accounts of busi-'ness due to them, appoints the same to be produ-'ced; but finds, in consequence thereof, they have a 'preference, primo loco, for the amount of the said 'accounts, as the same shall be afterwards ascertain-'ed.' This interlocutor became final; and, after all the other creditors, in right of the reserved heritable debt, had appeared, and a common agent had been named, the preference of Campbell and Clason, over these creditors, was resisted, on the ground,—1. That their lien could not extend beyond Scott's right in the lands and title-deeds, which was limited

by the co-existing right of property held in both by the heritable creditors. 2. That the burden appeared ex facie of the titles; and, therefore, they were certiorated of the limited nature of Scott's right; and, 3. That the title-deeds had not been deposited by the proprietor by whom the heritable debt had been created, but by a purchaser whose acts could not affect the creditor. On the other hand, Campbell and Clason maintained, 1. That their preference was res judicata by the final interlocutor; and, 2. That, at all events, their right to such a preference was settled by a series of decided cases. The Lord Ordinary preferred 'them in terms of their interest produced, 'and, in virtue of their claim of hypothec, to the 'amount of their several accounts lodged in process, 'when taxed.' And the Court, (waving the objection of res judicata), after a hearing in presence, and on the report of Lord Mackenzie, as Lord Probationer, adhered.

Some of their Lordships were of opinion that the preference was founded on absolute necessity and utility; and all agreed, that, even although the principle were to be held erroneous, the rule was now fixed.

Claimants' Authorities.—2.—Ayton, Nov. 23, 1705, (6247); Stewart, Jan. 24, 1742, (6248); Lidderdale, July 5, 1749, (6248); Finlay, Jan. 23, 1773, (6250); Hamilton's Creditors, Aug. 9, 1781, (6253); Creditors of Newlands, Feb. 9, 1793, (6254); Hotchkis, Jan. 16, 1794, (6256); Campbell, Feb. 1, 1817, (F. C.); 2. Bell, 118.

CAMPBELL & CLASON, W. S.—A. GOLDIE, W. S.—Agents.

ROBERT ORR, Pursuer.—*Greenshields.* No. 16.
JAMES ADAM and Others, Defenders.—*Cuninghame.*

Thirlage—Commuted Dues—Stat. 39, Geo. III, c. 55.—The defenders, whose lands are thirled to the pursuer's mill, instituted proceedings under the 39. Geo. III, c. 55, to have the dues commuted to a fixed payment. The mill being solely for grinding oats, and the dues having been, by long usage, payable in oatmeal, the jury converted them into a fixed payment in '*meal.*' The pursuer raised action of reduction of the verdict of the jury, and decree of the sheriff following thereon, on the ground, inter alia, that the act only authorized the jury to commute the dues into a certain quantity of 'grain,' and that this term 'grain' did not comprehend 'meal.' The Lord Ordinary repelled the reasons of reduction; and the Court, after having appointed minutes to be given in, 'stating, 'from the British statutes, what is there said ex-'planatory of the word 'grain,'' adhered.

Nov. 15, 1822.
SECOND DIVISION.
Lord Pitmilly.
F.

C. J. F. ORR, W. S.—W. PATRICK, W. S.—Agents.

R. Y. ANDERSON, Charger.—*Ivory.* No. 17.
Mrs. M. GOVAN, Suspender.—

Process.—Anderson gave in, against an interlocutor of the Lord Ordinary, a representation, titled merely 'Representation for Rob. Y. Anderson, W. S.' without any address. His Lordship refused to write on it, and afterwards, on hearing parties at the bar, he found, that being 'both informal, and not subscribed 'by counsel when presented to the Lord Ordinary, he 'considers that it did not prevent his interlocutor from 'becoming final;' but allowed Anderson to apply to the Court, under the 48. Geo. III, on payment of the

Nov. 15. 1822.
SECOND DIVISION.
Lord Cringletie.
M.

previous expences. The representation was then withdrawn, a new one substituted, and a representation given in against the above judgment, which his Lordship refused 'in pœnam of such proceedings.' On a petition the Court adhered.

Charger's Authorities.—A. S. Nov. 11, 1708; 4 St. 1, 66; Spottiswoode, 71.

R. Y. ANDERSON, W. S. —Agents.

No. 18.

D. KERR, Petitioner.—*Boswell.*
J. KYLE, Respondent.—*Rutherfurd.*

Nov. 16, 1822.

FIRST DIVISION.

S.

This was an application for recal of an inhibition, which the Court granted on caution.

W. PATRICK, W. S.—MACMILLAN & GRANT, W. S.—Agents.

No. 19.

CHARLES HUTCHISON, Suspender.—
GEORGE YOUNG, Charger.—*More.*

Nov. 16, 1822.

SECOND DIVISION.

Bill-Chamber.

Lord Robertson.

Principal and Agent.—Hutchison presented a bill of suspension of a charge at the instance of Young, for payment of £107 : 1s., being the amount of freight and demurrage contained in a decreet of the High Court of Admiralty, pronounced against him in absence; on the ground, that Messrs. J. and T. Black, who had freighted the vessel, had done so for their own behoof, and without authority from him. From letters of the suspender, however, it appeared that he had received the bills of lading, had acted as the true freighter of the vessel, and was owner of the cargo. The Court, on the report of the Lord Ordinary, refused the bill.

GEO. WILSON—A. CONNELL, W. S.—Agents.

Jno. M'Gowan, Complainer.—*Clerk—M'Neill.* No. 20.
Sir J. Montgomery, Bart., Respondent.—*Moncreiff—H. J. Robertson.*

Freehold Qualification—Fee and Liferent.—The forty shilling lands of Winkston were conveyed by John Anstruther to his daughter, Rachel Lindsay, the complainer's wife, 'in liferent, for her liferent use 'allenarly, and, after her decease, to the heirs of her 'body in fee,' failing whom, to the disponer's heirs and assignees whatsoever; and it was provided, 'that 'the said Rachel Lindsay, notwithstanding that her 'right is limited to a liferent, shall have power to 'burden the said lands with such provisions, in fa-'vour of younger children, as she may think proper.' Her husband, the complainer, claimed to be enrolled among the freeholders of Peeblesshire, in right of his wife. The freeholders having refused to enrol him, he complained to the Court, who held, 1. That the right of his wife was merely a liferent; and, 2. That a husband was only entitled to vote when his wife's right was a right of fee, the term 'property, in the 12th of Queen Anne, c. 6, (§ 7), being used as contradistinguished from 'liferent;' and they dismissed the complaint accordingly.

Nov. 16, 1822.

Second Division. M'K.

Complainer's Authorities.—(1.)—Children of Lindsay, Dec. 9, 1807, (Ap. Fiar, No. 1.);—(2.)—Bell on Election Law, p. 135.

Respondent's Authorities.—(1.)—Newlands, Jan. 9, 1794; Bell, 54;—(2.)—12. Q. Anne, c. 6, § 7; Fraser, June 19, 1804, (Ap. Member of Parliament, No. 8); Wight, p. 239; Bell, p. 140.

J. Young, W. S.—R. Stuart,—Agents.

No. 21. P. GRAHAM and Others, (Trustees of A. GRAHAM).—*A. Dunlop, Junior.*
M'NAB'S Trustees.—*Jameson.*

Nov. 18, 1822.
FIRST DIVISION. Lords Gillies & Meadowbank. S.

Interest—Expences.—An action of multiplepoinding was, in 1817, raised by the trustees of M'Nab, in name of Graham and others, tenants on the estate of M'Nab; and, in May 1818, an order was issued to condescend on the fund *in medio*. Although this order was repeatedly renewed, it was never implemented by Graham, and, at last, a condescendence was lodged by M'Nab's trustees. The Lord Ordinary, (Jan. 22, 1822), found Graham liable in four and a half per cent. of interest on the fund which was in his hands, from the 2d of April 1819, and in the expences of process. The Court refused a petition, without answers.

J. TWEEDIE, W. S.— —Agents.

No. 22. J. GLEN, (HOGG'S Trustee).—*Monteath.*
MISS PORTERFIELD.—

Nov. 18, 1822.
FIRST DIVISION. Lord Alloway. D.

Bankrupt.—This was a branch of No. 348, vol. i, (which see). After Glen's claim against Miss Porterfield, for the expences of the sequestration, had been repelled, he demanded those attending the sale of the lands over which she held a security. But the Lord Ordinary, in respect both of the prior decision, and of a transaction inconsistent with this demand, refused it; and the Court adhered.

Glen's Authority.—1. Bell, 453.

G. NAPIER—A. PEARSON, W. S.—Agents.

P. M'ARTHUR, (Disponee of C. FALCONER), Pursuer. —*Cranstoun—Fullarton.*

A. JAMIESON and Others, (Trust-Disponees of M. FALCONER), Defenders.—*Jeffrey—Jameson.*

No. 23.

Nov. 19, 1822.

FIRST DIVISION. Lords Gillies & Meadowbank. S.

Fiar, Absolute or Conditional—Implied Revocation.—Falconer purchased, at a judicial sale, the estate of Durn, comprehending, 1. the barony of Durn, holding of the crown; 2. the lands of Westside and others, formerly part of that barony, holding of Keith Dunbar; and, 3. the lands of Dykehead and others, which hold of the Duke of Gordon. All of these lands were contiguous, and were commonly called Durn. By the decree of sale, the Court adjudged 'all and haill the foresaid lands of Durn, comprehending the Mains thereof, Westside,' &c. 'lying 'within the parish of Fordyce, and shire of Banff;' 'as also, sold, disponed, adjudged, &c. all and haill 'the foresaid lands of Meikle and Little Dykehead,' and others, 'lying within the lordship of the forest 'of the Boyne, parish foresaid of Fordyce, and shire 'of Banff.' By a deed of settlement, Falconer, on the narrative that 'I am now resolved, in case of my 'death before my titles to the said lands and estate 'are made up and completed, to convey the said purchase to and in favour of Lydia Turton or Falconer, 'my dearly beloved wife, to whom I have, by a 'former settlement, conveyed my whole personal 'estate, out of which the price of said lands must 'be paid;' therefore, he assigned to her, 'her heirs, 'assignees, and disponees, all and whole the said 'lands of Durn, lying in the parish of Fordyce, and 'shire of Banff, as the same are more fully described

'in the articles of roup and sale; and with the said 'articles of roup themselves, minutes of roup, and 'enactments following thereon in my favours, to-'gether with the interlocutor in the sale to be pro-'nounced thereon in my favours by the said Lords, 'with all that has followed or may be competent to 'follow thereon,' and with power to her, 'in case of 'my death before I shall have made up my titles to 'the said lands and estate, and made a settlement 'thereof, to obtain the said decree of sale, and make 'up her titles thereto, in virtue of these presents, in 'the same manner that I would have done myself 'had I been in life;' but reserving right 'to alter 'and revoke these presents by any writings under 'my hand.' Thereafter Falconer obtained a charter of sale and resignation to him, his heirs, and assignees, of the lands of Durn, holding of the crown, on which he was infeft; and he died vested in the personal right to those lands which were held of subjects superior. His wife, in virtue of the assignation in the deed of settlement, made up titles to the whole lands by adjudication in implement. The heir-at-law brought a reduction of these titles, (which was insisted in by his disponee, M'Arthur), on the grounds, 1. That they were inept, as the adjudication proceeded on a charge against a person who was not heir; 2. That the assignation was a conditional and revocable deed, and that it had been virtually revoked by the subsequent charter and infeftment; and, 3. That it did not convey the lands of Dykehead, &c., which, by the decree of sale, had been adjudged as a separate tenement. The Lord Ordinary reduced the titles, so far as flowing from the person who was not the heir, but, *quoad ultra*, assoilzied; and the Court adhered.

Pursuer's Authorities.—(2.)—Molle, Dec. 13, 1811, (F. C.);—(3.)—Clark, May 31, (Ante, No. 52, Vol. I).

C. M'DONALD, W. S.—A. MONYPENNY, W. S.—Agents.

W. HUTCHISON, Pursuer.—*Robertson.* No. 24.
D. CUTHBERTSON and COMPANY, Defenders.—*Jameson.*

Nov. 21, 1822.

FIRST DIVISION. Lords Gillies & Meadowbank.

Bona et Mala Fides.—This was a special case, the question being, Whether Hutchison was a bona fide indorsee of a bill of lading? The Lord Ordinary held that he was not; and the Court adhered.

H.

Pursuer's Authority.—1. Bell, 120–125.

W. POLLOCK— —Agents.

W. YOUNG and COMPANY, and Others, Petitioners.— No. 25.
Murray—Cuninghame.
J. LEVEN, Respondent.—*Robertson.*

Nov. 21, 1822.

FIRST DIVISION.

Appeal.—Decree, applying the judgment of the House of Lords, reversing a series of interlocutors of the Court of Session, 'the Lords not meaning here-'by to determine any question with respect to any 'particular ground of appeal alleged by the Appel-'lants as applicable to any of the several interlocu-'tors complained of.'

H.

J. STUART, W. S.—J. TAIT, W. S.—Agents.

No. 26. D. KEMP, Suspender.—*Moncreiff—Colquhoun.*
R. BURNS, Charger.—*D. M'Farlane.*

Nov. 21, 1822.
SECOND DIVISION.
Bill-Chamber.
Lord Bannatyne.
F.

Bill of Exchange.—Kemp bought wine from Wright, and granted his acceptance for the price. Wright indorsed the bill to Burns, who charged Kemp on it. Kemp presented a bill of suspension, but the Lord Ordinary and the Court refused it, in respect no caution was offered.

W. CRAIG, W. S.—GREIG & PEDIE, W. S.—Agents.

No. 27. W. MAULE of Panmure, Pursuer.—*Clerk—Moncreiff—Alison.*

W. MAULE of Killumney, and his Creditors, Defenders.—*Corbet—Cranstoun.*

Nov. 21, 1822.
SECOND DIVISION.
Lord Pitmilly.
F.

Repetition.—A competition arose, in 1781, between Lord Dalhousie, as administrator for his son, the pursuer, and Lieutenant Thomas Maule, father of the defender, as to the right of succession, under two different classes of settlements, to the estates of Killie and Ballumbie, and to two leases for ninety-nine years, of the parks and mansion-houses of Panmure and of Brechin. The Court, on the 2d April 1782, found the pursuer entitled to succeed to the estates, and Lieutenant Maule to take up the leases. Against this judgment, in so far as it preferred Lieutenant Maule to the leases, Lord Dalhousie entered an appeal; but, shortly thereafter, an agreement was entered into between the parties, in the form of a submission, and decreet-

arbitral, declaring, that Lieutenant Maule had no claim to the leases; but, in consideration of the Court having sustained his right, ordaining Lord Dalhousie for himself, and as administrator for his son, to make payment of £3,500, of which, £500 was to be paid instantly to Lieutenant Maule, and the remaining £3,000 to be vested in trustees, for his behoof, and a certain series of heirs. This sum of £3,000 was to be payable at different periods, and the interest annually; but it was declared, that if Lieutenant Maule, or his son, William, (the defender), or any of the specified heirs, 'shall hereafter attempt 'to make any claim on the said deeds, or any of 'them, under pretence of their not being bound by 'this submission, or on any other ground whatever, 'it shall be competent for George Earl of Dalhousie, '&c. to insist for repetition of the trust-money, so 'far as the same is unuplifted at the time, or so far 'as the same has been uplifted by the person mak-'ing such claim, or by any other whom he repre-'sents.' This money was, accordingly, vested in trustees; two instalments were paid; and the interest was regularly drawn by Lieutenant Maule; and, after his death, by his son, the defender, or by creditors in his right, down to 1815. In 1810, the defender raised action of reduction of the submission and decreet-arbitral of 1782. The Court and the House of Lords reduced that deed as 'a submission and de-'creet-arbitral affecting any rights of the defender;' but found that the interlocutor of the Court of 1st March 1782, (which preferred Lieutenant Maule to the leases), could not be considered as final against Maule of Panmure; and, on the merits of the competition, they altered that interlocutor, and found, that the

defender had no right to the leases.* The pursuer thereupon raised the present action of declarator and repetition, to obtain payment of £2,500 remaining vested in the trustees, and for repetition of the interest received by the defender and his creditors, on the ground, that, in consequence of his challenging the decreet-arbitral, and again insisting in his right to the leases, the defender had forfeited his claim to the money agreed by that deed to be paid, in consideration of his renouncing all claim to the leases in dispute. A multiplepoinding was, thereafter, raised by the trustees, and claims being lodged for the pursuer and the creditors, the two actions were conjoined and reported by the Lord Ordinary, on informations. The Court restricted the conclusions of the summons (of consent of the pursuer) to the recovery of the principal sum, and, as to it, decerned in his favour; and, to that extent, preferred him to the fund in medio.

J. YULE, W. S.—JOHNSTONE & LITTLE,—Agents.

No. 28. J. WALKER, Pursuer and Suspender.—*Cranstoun—Rutherfurd.*

A. WYLLIE and J. INNES, Defenders and Chargers.—*Moncreiff—Buchanan.*

Nov. 21, 1822.

SECOND DIVISION. Lord Pitmilly. B.

Wrongous Imprisonment—Damage and Interest.—Walker, residing in Aberdeen, agreed, by written missive, to purchase from Wyllie and others, farmers in Kincardineshire, their crops of potatoes, to be paid for on delivery on board a vessel to be provided by Walker at Stonehaven. The potatoes were, accord-

* Maule v. Maule, Dec. 2, 1817, (F. C.)

ingly, put on board, in presence of Walker's clerk, who had been sent to Stonehaven, for the purpose of receiving delivery. When the vessel was loaded and about to sail, Walker, who had himself come to Stonehaven, refused payment, on pretence that certain stipulations, as to the riddle through which the potatoes were to be passed, had not been complied with by Wyllie. On this, Wyllie made summary application to the Sheriff-substitute, (the defender Innes), who granted warrant for apprehending Walker, and detaining him till he found caution, judicatum solvi. Having found caution, he was set at liberty, and immediately raised letters of suspension and liberation, and action of damages for wrongous imprisonment against Wyllie, and against Innes, the Sheriff-substitute. The Court held it proved, from the declaration of Walker, emitted on his apprehension, from letters and other documents produced, and from the whole circumstances, that he had been guilty of an attempt to swindle; therefore, in the action of damages, they adhered to the Lord Ordinary's interlocutor, which found, that the defender, Wyllie, was entitled to make the application complained of to the Sheriff, and that the Sheriff acted correctly in granting the warrant thereon, and assoilzied the defenders; and, in the suspension, found the letters orderly proceeded.

Pursuer's Authorities.—Ramsay, Dec. 19, 1799, (Ap. Wrong. Imp. No. 1); Murray, May 15, 1810, (F. C.); Rae Mure, July 10, 1811, (F. C.); Smith, Feb. 12, 1812, (F. C.)

Defenders Authorities.—Ross, June 1752, (17071.)

A. Burns, W. S.—R. Burnet, W. S.—J. B. Fraser, W. S.—Agents.

No. 29. SIBBALD'S TRUSTEES, Pursuers.—*Moncreiff—Buchanan—Graham Bell.*
GEO. CROSBIE, Defender.—*Cockburn.*

Nov. 21, 1822.
SECOND DIVISION.
Lord Cringletie.
M'K.

In an action of count and reckoning at the instance of Sibbald's Trustees against Crosbie, the Judge-Admiral pronounced decree of absolvitor. Of this, Sibbald's trustees brought a reduction, in which no general point arose. The sole question was, whether certain consignments to Crosbie, by William Sibbald and Company, in whose right the trustees were, belonged to them, or to John Sibbald and Company? By Crosbie it was alleged, that the right of W. Sibbald and Company had been transferred to J. Sibbald and Company; and the Lord Ordinary and the Court finding this established, assoilzied him.

H. SIBBALD, W. S.—H. J. WYLIE,—Agents.

No. 30. D. and J. M'LACHLANS, Pursuers.—*Jameson—Ja. MacDonald.*
A. M'INNES, Defender.—*Moncreiff—Buchanan.*

Nov. 22, 1822.
FIRST DIVISION.
Lord Meadowbank.
S.

Registry Acts—26. *Geo. III, c.* 60—34. *Geo. III, c.* 68.—On the 28th of June 1817, D. M'Lachlan addressed a missive to M'Innes, by which he made 'an offer of £70 for your one third share, or part 'of the sloop or vessel called the Minnie, of Fort-'William. The price to be payable as follows.—'£80 sterling upon the 1st November, and the re-'mainder at six months from this date,' &c. 'and 'bills, with security to your satisfaction, for the

'sums payable at said period, will be given when de-
'manded. If I require a vendition from you, I pro-
'pose that the expence be defrayed between us pro-
'portionally.' M'Innes accepted of the offer; received bills in terms of it from J. and D. M'Lachlans; gave possession of the vessel; but did not then execute a vendition. When the bill fell due, a partial payment was made; and, for the balance, after the execution of ultimate diligence, new bills were granted. On the 16th November 1819, a vendition was tendered, with the transfer indorsed on the certificate of registry in the custom-house books, of the date of the missive. As, however, M'Lachlans refused to pay their share of the expence of the vendition, it was not delivered. Immediately thereafter they raised an action of reduction of the bills; of repetition of the money paid; and of damages; on the ground that the original sale was null under the registry-acts, and that, therefore, the bills had been given without value. In defence, it was alleged, that the bills had been granted for the stipulated price of the shares of the vessel, —that possession had been given,—and that, after the bills fell due, a vendition had been tendered, in terms of the bargain, and refused. It was, therefore, maintained, that the bills were onerous, and that the pursuers were barred, personali exceptione, from founding on the registry-acts. The Lord Ordinary assoilzied the defender, and the Court adhered.

A majority of their Lordships were of opinion, that, after refusing the tender of the vendition, the pursuers were barred, personali exceptione, from insisting in this action; but one Judge thought, that, even although there were grounds for it, the Court could

not sustain such a plea in opposition to the registry-acts.

Pursuers Authorities.—1. Bell, 88, 82; Spence, Jan. 20, 1809, (F. C.); Porter's Trustees, Dec. 11, 1816, (F. C.); Leitch, May 20, 1819, (F. C.); 1. Bell, 655; Addenda, No. 7.

C. M'DONALD, W. S.—D. CAMERON, W. S.—Agents.

No. 31. DUKE of GORDON, Pursuer.—*Moncreiff—Lumsden—P. Robertson.*
J. INNES, Defender.—*Cranstoun—Skene—Hope.*

Nov. 22, 1822.
SECOND DIVISION.
Lord Pitmilly.
B.

Tailzie—Lease.—Innes acquired right to a lease of the estate of Durris for 76 years and a lifetime, with the right of cutting wood, working minerals, and other extensive powers. The estate was possessed by the granter of the lease under an entail, which prohibited the heirs from 'disponing, wadsetting, selling, or putting away' the lands. After the granter's death, the next heir raised action of reduction of the lease, as in contravention of the entail, on account both of its duration and of the great powers granted to the tenant. The Court found the lease to be 'in violation of the deeds of entail of the estate 'of Durris, and, therefore, reducible;' but appointed memorials on the question, Whether the lease might not be sustained for such shorter period as should be considered to be intra vires of the granter. Against this judgment, so far as hostile to him, Innes appealed. In the meantime, on advising the memorials, the Court found, 'that the lease under reduction 'cannot be sustained for any period of duration,' and reduced the same*, (March 9, 1819). Innes pre-

* See Baroness Mordaunt against Innes, March 9, 1819, Fac. Coll.

sented a reclaiming petition, which was superseded till the appeal should be disposed of; and the judgment of this Court having been affirmed, (July 5, 1822), the petition was refused.

JAS. S. ROBERTSON, W. S.—J. BOWIE, W. S.—THOS. INNES, W. S.—Agents.

J. A. CAMPBELL, (Assignee of Mrs. E. S. JUSTICE), Pursuer.—*Borthwick.*
JOHN STUART, (Trustee for Creditors of J. JUSTICE), Defender.—*J. M'Farlan.*

No. 32.

Nov. 22, 1822.

SECOND DIVISION. Lord Cringletie. M'K.

Trust.—This was an action at the instance of Campbell for behoof of Mrs. Justice, for payment of an annuity provided to her in a trust-deed by her husband, in favour of Stuart, for behoof of his creditors. The Lord Ordinary and the Court assoilzied Stuart, in respect the trust had fallen by the non-accession of the creditors, reserving to Mrs. Justice to proceed against her husband and his estate.

J. A. CAMPBELL, W. S.—JAS. LAIDLAW, W. S.—Agents.

A. GOLDIE, W. S. Common Agent in Ranking of Parton.—*Fullarton—Whigham.*
A. CROMBIE, Assignee of LADY GORDON.—*Pyper.*

No. 33.

Nov. 23, 1822.

FIRST DIVISION. Lord Alloway. S.

Compensation—Retention.—Mr. Glendonwyn, on the 22d of April 1809, by a minute sold the estate of Parton to Scott, under burden of the price. The term of entry was to be at Whitsunday 1810, from which period Scott was to pay interest on a part of the price at four and a half per cent. Before the arrival of that term, Glendonwyn died. Lady Gordon, his

eldest daughter, refused to implement the sale, and made up titles to the estate under an alleged destination in her favour, and took possession. She was, however, decerned in an action at the instance of Scott, to fulfil the bargain, which she did; and she removed from the lands in March 1811. Scott becoming bankrupt, and a ranking and sale of the estate having been instituted, a claim was made by Crombie, assignee of Lady Gordon, as one of the heirs-portioners of her father, for her share of the price. Goldie, the common agent, objected, that, from this claim, there ought to be deducted a year's rent of the estate, from Whitsunday 1810 till Whitsunday 1811; and also a sum equal to the difference betwixt the rental and the amount of the interest of the price. The Lord Ordinary found, 'that Lady Gordon having made up 'titles to, and entered into possession of the lands of 'Parton and others, she and her husband were accountable for the rents uplifted by them during the period 'she was in possession; but, in respect that as Mr. 'Scott has not paid the price of the lands of Parton 'and others, of which so large a proportion is due to 'Lady Gordon, she and her husband, although liable 'for this personal claim to Mr. Scott, on account of 'the rents uplifted by her, are entitled to plead retention and compensation against any claim of this nature, in virtue of the large debt due by Mr. 'Scott to her, seeing that the whole price of the 'lands being unpaid by Mr. Scott, leaves so large 'a sum due by him to Lady Gordon, and the 'creditors of Mr. Scott cannot stand with regard to 'this personal claim, in a better situation than Mr. 'Scott himself would have done, and are liable to 'every plea of compensation or retention which could 'have been pleaded by Lady Gordon against him:

'therefore, found Lady Gordon and her husband entitled to plead compensation or retention against this claim made upon the part of Mr. Scott, or those in his right.' To this interlocutor the Court adhered.

A. GOLDIE, W. S.—J. MORRISON, W. S.—Agents.

M. STOCKS, Suspender.—*Boswell.*
G. MILLER, Charger.—*Lockhart.*

No. 34.

Nov. 23, 1822.

FIRST DIVISION.
Bill-Chamber.
Lord Kinedder.
D.

Bill of Exchange.—Stocks indorsed to Miller a bill drawn by Davidson on 'Messrs. James Steuart 'and Company, Thames' Street, London.' The bill having been protested for non-acceptance and non-payment, Stocks was charged to pay it. He offered a bill of suspension, on the ground that the bill had not been presented at the place of payment, which, he alleged, was No. 104, Low Thames' Street, whereas the notary had gone first to a Mr. Stewart's, No. 110, Upper Thames' Street, and had protested it against 'Messrs. Stewarts,' at No. 10, St. Mary Axe, Bury Court. The Lord Ordinary refused the bill, but the Court passed it on caution.

Suspender's Authorities.—1. Bell, 323, and cases there referred to; Beveridge, 3. Camp. 262; Browning, Gow, 81.
Charger's Authority.—1. Bell, 320.

J. M'ANDREW—S. C. SOMERVILLE, W. S.—Agents.

R. HILL, Suspender.—*Maidment.*
Mrs. M. KIPPEN, &c. Chargers.—*Alison.*

No. 35.

Nov. 23, 1822.

SECOND DIVISION.
Bill-Chamber.
Lord Pitmilly.
F.

Compensation.—Hill presented a bill of suspension of a charge by Mrs. Mary Kippen and others, trus-

tees of his brother, the late James Hill, on a bond for a cash-credit, in which the two brothers were joint-obligants, and to which the chargers had obtained an assignation. The suspender alleged certain claims against the deceased in compensation; but the Lord Ordinary refused the bill, in respect of no caution being offered. An offer of caution, however, having been made at the bar, the Court passed the bill.

JAS. J. FRASER, W. S.—TENNENT & LYON, W. S.—Agents.

No. 36.

R. HILL, Pursuer.—*Maidment.*
DEWAR'S TRUSTEES, Defenders.—*J. M'Farlan.*

Nov. 23, 1822.

SECOND DIVISION.
Lord Cringletie.
F.

Expences.—Dewar died, leaving a disposition to trustees of certain heritable subjects in Edinburgh, in which he had been infeft and entered with Hill, the superior. Dewar had, in fact, no just right to a great part of the subjects; and, immediately on his death, a reduction was instituted of his titles, and of the trust-disposition, by the parties truly having right to the property. Hill, the superior, was in the knowledge of Dewar's want of title, and although the true vassal last entered was still alive, he pursued a declarator of non-entry against the trustees. The trust-disposition was, in the meantime, reduced as to a large portion of the subjects, and the trustees agreed to enter as to the rest. The Lord Ordinary, 'in respect that the pursuer was sensible that John Dewar had no sort of right to the subject,' and that his titles were challenged, found, 'that this action was too anxiously and prematurely brought against the respondents, requiring them to enter to the whole tenement,' and

found Hill liable in expences. The Court adhered.

HILL & HOPKIRK, W. S.—W. WILLIAMSON,—Agents.

A. IMLACH, Suspender.—*Hope.* No. 37.
W. STUART, Charger.—*Skene.*

Process—Suspension.—The Lord Ordinary refused, as incompetent, a bill of suspension, as of a threatened charge of removing, on an interlocutor of the sheriff, in respect the interlocutor was not a final decree of removing; and the Court adhered.

Nov. 23, 1822.
SECOND DIVISION.
Bill-Chamber.
Lord Kinedder.
M'K.

J. G. HOPKIRK, W. S.—CARNEGY & SHEPHERD, W. S.—Agents.

EARL OF STAIR'S TRUSTEES, Suspenders.—*Dean of Faculty Ross—Cranstoun—Hope.* No. 38.
SIR H. D. HAMILTON, Charger.—*Moncreiff—Jameson.*

Tailzie—Statute.—Sir H. D. Hamilton, the heir in possession of the entailed estate of Bargany, obtained an Act of Parliament, empowering him to exchange part of it for lands held by him in fee-simple. The statute, however, declared, that it was not intended thereby 'to render the right of the said Sir 'H. D. Hamilton, or of the descendants of the said 'Sir H. D. Hamilton, his grandfather, to the said 'entailed estate of Bargany, &c. better, or more 'effectual, or in any respect different from what such 'right or title was prior to the passing of this act.' Provisions were then made for rendering the exchange effectual by disentailing the lands exchanged

Nov. 26, 1822.
FIRST DIVISION.
Bill-Chamber.
Lord Mackenzie.

for those held in fee-simple, and for incorporating the latter, under the authority of the Court of Session, in the entail. On the accomplishment of this, it was enacted, that the heir of entail, (whose rights were, in other respects, expressly saved), 'shall not, 'nor shall any of them have any claim, right, title, 'or interest whatever, in the lands, &c. to be dis-'entailed, &c.; but that, thereafter, in lieu and 'place of such claims, right, title, or interest in the 'lands, &c. they, and every of them, shall, in every 'respect, and to all intents and purposes, have, and 'be entitled to such and the like, and as beneficial 'claims, rights, titles, and interests in, and to the 'lands' held in fee-simple, and to be entailed, as they would have had in those lands which had been included in the entail. The exchange was duly effected; and, in 1822, Lord Stair's trustees purchased a great part of the disentailed lands. In the meanwhile, the estate of Bargany had been claimed by Mrs. Fullarton; and the House of Lords, in an appeal by her, had made a remit to the Court of Session, favourable to her pretensions. Lord Stair's trustees then presented a bill of suspension of a threatened charge for payment of the price, on the allegation, that they were not in safety to accept of a title from Sir H. D. Hamilton. But the Court, (on the report of the Lord Ordinary), refused the bill, in respect of the terms of the Act of Parliament.

J. & A. Smith, W. S.—Russell, Anderson, & Tod, W. S.—Agents.

F. GARDEN, (J. M'CAUL and SON'S TRUSTEE), Pursuer.—*Grahame.*
J. STIRLING and Others, Defenders.—*Jardine.*

No. 39.

Nov. 26, 1822.

FIRST DIVISION.

Lord Alloway.

Bankrupt—Statute, 1621, c. 18.—In 1810, J. M'Caul disponed, mortis causa, his estate to his sons, as trustees, and, in 1813, he executed a new trust-deed in their favour, in which he provided £3,000 to his daughter Sarah. A marriage-contract was entered into between her and Mr. Stirling in 1818, under which her father bound his sons, as trustees, to pay to her husband, Mr. Stirling, £3,000. This sum, however, was to be heritably secured, and not paid to Mr. Stirling, till he had provided a certain jointure to his wife. Mr. M'Caul died in March 1819, at which time he was a partner of J. M'Caul and Sons, and the firm of which was continued. On his death, the £3,000 was entered as a debt due by the company; and his eldest son, (who was a partner), in implement of the trust-deed, made up titles to his father's property, and granted an heritable bond over it for the £3,000 to the trustees, for behoof of Mrs. Stirling. Within sixty days thereafter, the company having been sequestrated, Garden, as trustee on their estate, brought a reduction of the deeds of settlement, on the act 1621, and of the heritable security, on the act 1696. The Lord Ordinary at first decerned in terms of the libel; but the defenders having contended that, to the extent of the provision in the contract of marriage, the deeds of settlement, and relative heritable bond, were onerous, his Lordship recalled his interlocutor, quoad the conclusion under the act 1621, and appointed them

'to state, in a condescendence, the facts and circumstances they allege with regard to the solvency of Mr. M'Caul at the time of his death, or at the time the contract of marriage was entered into.' To this interlocutor the Court adhered, with this explanation, that the contract of marriage, and deeds of settlement in relation to it, are not struck at by the act 1621.

Defenders Authorities.—4. Ersk. i, 33; 2. Bell, 194; Blackburn, May 29, 1816, (F. C.)

J. G. Hopkirk, W. S.—G. Dunlop, W. S.—Agents.

No. 40.

D. M'Gown, Suspender.—*Maitland.*
J. Simpson, Charger.—*Shaw.*

Nov. 26, 1822.

First Division. Bill-Chamber. Lords Succoth & Meadowbank. S.

Jurisdiction.—M'Gown, a spirit-dealer in Glasgow, accepted a bill, dated Glasgow, and payable at his shop there. The bill was indorsed to Simpson, who duly protested it for non-payment, and charged M'Gown personally, on an extract of the registered protest from the books of the burgh. Against this charge, he presented a bill of suspension, on the ground, 1. That although he had a shop within the burgh of Glasgow, yet he resided beyond its limits, and, therefore, the magistrates had no jurisdiction over him; and, 2. That Simpson was not an onerous bona fide holder, which he referred to his oath. The Lord Ordinary, after the oath had been taken, passed the bill without caution; but the Court, holding that M'Gown was subject to the jurisdiction of the magistrates, in relation to this debt, remitted to his Lordship to refuse the bill as to the jurisdiction, and to pass it, quoad ultra, on caution.

Charger's Authorities.—(1.)—Kames' Law Tracts, Tit. Courts; Vernor, Nov. 28, 1610, (4788); 1. Ersk. 2, 20; II. Hume, 56; Dodds, June 11, 1765, (4793); Scruton, Dec. 1, 1772, (4822.)

W. MARTIN,—A. P. HENDERSON,—Agents.

JOHN STEIN, Pursuer.—*Buchanan.* **No. 41.**
CHARLES STEWART and his TRUSTEE, Defenders.—*Moncreiff—Christison.*

Nov. 26, 1822.

SECOND DIVISION. (late) Lord Meadowbank. M'K.

Sale.—This was an action for payment of the price of four puncheons of spirits, alleged to have been sold by Stein to Stewart, who pleaded, in defence, that he had never contracted directly with Stein, but had merely agreed with one Martin, who had bought ten puncheons from the pursuer, to take four of them off his hands. The Lord Ordinary decerned against the defenders; and the Court, after allowing a proof, adhered.

W. COOK, W. S.—JAMES BRIDGES, W. S.—Agents.

W. GALLOWAY, Pursuer.—*Forsyth.* **No. 42.**
W. JEFFREY, Defender.—

Nov. 26, 1822.

SECOND DIVISION. Lord Cringletie. F.

Process.—The Court refused a petition, against an interlocutor of the Lord Ordinary, in respect that the trustee on the sequestrated estate of the petitioner, (who had become bankrupt pending the action), refused to sist himself as a party.

CH. STEUART,—N. W. ROBERTSON,—Agents.

No. 43. GENERAL WALLACE AGNEW, Pursuer.—*Moncreiff—Skene.*

MAGISTRATES of STRANRAER and Others, Defenders.—*Cranstoun—Buchanan.*

Nov. 27, 1822.

FIRST DIVISION. Lord Alloway. H.

Fishing—Prescription.—By a royal charter in 1701, the lands and barony of Lochryan were granted to the ancestor of General Agnew, 'cum plena 'potestate, jure et titulo locare seu locata fore cau- 'sandi oystriaria lie oyster scalps una vel plura ubi 'convenien. et necessaria fuerit super totum littus 'dictæ baroniæ de Lochryand, infra orem maris lie 'sea mark et in alto mare ubi maximo refluit et to- 'tum lacum de Lochryand, cum solo privilegio quod 'nullis licitum erit piscare seu haurire lie dreg oys- 'tria infra dictas bondas vel oystriaria, lie scalps im- 'ponere.' On this charter and a relative sasine, to which General Agnew had right by a regular series of titles, he raised an action of declarator, and of suspension and interdict, against the Magistrates of Stranraer, to have it found, that he had the exclusive privilege of fishing oysters in the Loch of Lochryan. In defence, the Magistrates rested on ancient titles, conveying to them the lands of Stranraer, adjacent to Lochryan, and creating them into a burgh of barony, with a free harbour in the loch; and, particularly, on a charter by James VI, in 1617, which erected Stranraer into a royal burgh. By this charter, there was granted, in the dispositive clause, 'li- 'berum portum infra totum lacum de Lochryand, ad- 'jacen. dicto burgo et terris cum privilegio portus in- 'fra omnes partes lie creikes herberes et landing 'places dicti lacus et totius limitis ejusd. ex utrisque

'lateribus et quod dictus lacus pro portu dicti burgi 'nunc et in omni tempore futuro erit;' and after enumerating various privileges, 'et liberatem habere 'pistores, &c. piscatores piscium, venditores,' &c. In the tenendas, there were introduced, in usual form, the words 'aucupationibus, venationibus, piscationi-'bus,' &c.; but no special right of fishing was disponed. Founding on these clauses, and alleging immemorial and uninterrupted possession of fishing oysters, the Magistrates maintained,—1. That the charter, coupled with immemorial possession, was relevant to infer a right of oyster-fishing as part and pertinent of the burgh property: 2. That General Agnew's right was lost, non utendo: and, 3. That the clause cum piscationibus in the tenendas, with forty years possession, and, more especially, as the lands of Stranraer were formed into a barony, and enjoyed extensive accessary privileges, afforded a complete title by prescription. The Lord Ordinary repelled the defences, in respect that the charter of Stranraer 'contains no right of fish-'ing in the dispositive clause, although, in the tenendas, 'there is thrown in 'tenend. et habend. totam et inte-" gram dictam nostram burgam cum privilegiis,' &c.; 'and, amongst others, 'aucupationibus, piscationibus;' 'that although the pursuer, in his charter 1701, has 'an exclusive grant of the oyster-fishing, or oyster-'scalps, in the loch of Lochryan, yet this did not 'prevent any other proprietor, with a right of fish-'ing, from acquiring a prescriptive right to fish oys-'ters; but that the pursuer's right, renewed in all 'the succeeding investitures, could not be lost, ex-'cept in so far as others had, upon a proper title, ac-'quired a right by prescription; therefore, that the 'burgh of Stranraer, without a right of fishings,

'could not have acquired the right of fishing oysters 'for its citizens, as burgesses, by mere possession.' Before this interlocutor was final, General Agnew applied for an interdict; but the Lord Ordinary refused, in hoc statu, to grant it. Both parties having reclaimed, the Court adhered to the principal interlocutor, and granted the interdict.

Pursuer's Authorities.—(2.)—S. Krak. 7, 10, and 8; Presb. of Perth, Dec. 24, 1728, (10723); Erskine against Abercromby, Feb. 7, 1812, (Not rep.); —(3.)—Lord Aboyne, Nov. 16, 1814, (F. C.)

Defenders Authorities.—(1.)—Earl of Leven, Feb. 22, 1711, (10816); Carmichael, Nov. 20, 1787, (9645); Braid, Jan. 24, 1800, (No. 2, Ap. 1, Property); (3.)—Laird of Monymusk, Dec. 1623, (10783); Fullarton, Feb. 6, 1672, (10843.)

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. & A. SMITH, W. S.—Agents.

No. 44. MAGISTRATES of GREENOCK, Pursuers.—*Moncreiff*—*Rutherfurd.*

GREENOCK GARDENERS' SOCIETY and Others, (Seat-Holders in the New Church of Greenock), Defenders.—*More.*

Nov. 27, 1822.

SECOND DIVISION. Lord Cringletie. F.

Clause—Homologation.—This was a question regarding the construction of an agreement entered into in 1759, between the Magistrates of Greenock, and certain persons, (among whom were the authors of the defenders), for the purpose of obtaining funds by subscription, to build a church. The proposals, circulated by the magistrates, contained these conditions,—That the subscribers should advance ten years rent, (at 3s. per seat.), of the seats subscribed for by each,—that to each subscriber, a 'tack of the seats sub-'scribed for, should be granted; and that, for such

'number of years, as it shall be necessary to pay them 'up, principal and interest, at 5 per cent. of the sums 'they have advanced,'—that these 'tacks should be 'assignable as any other property, but only to serve 'one or more of the subscribers' family, or any other 'person who shall stand in some degree of kindred 'or relation to him or her, and who, at the same 'time, shall be actual residenters in the town of 'Greenock;'—and 'that, notwithstanding of the 'tacks coming to an end, when the principal and in-'terest of the sums advanced are paid up, yet the 'subscribers and their heirs and assignees foresaid, re-'siding in the town, shall still be entitled to the seats 'which they, or their predecessors or authors, subscrib-'ed for, and had in lease, preferably to all others, and 'at the same low rent at which they enjoyed them 'during the tack.' The subscriptions were obtained on the faith of these proposals, the church built, and the several subscribers obtained possession of their respective seats, but without any regular leases being drawn out. The money advanced was paid off in the way prescribed, about the year 1777; but the subscribers still continued to possess at the original low rent. They also very generally assigned their seats to strangers as well as relations, who also possessed on the same terms; and, in many instances the seats were again repeatedly sold and assigned.

In 1819, the magistrates having proposed to charge a higher rent for the seats, which was resisted by the seatholders, they raised action of declarator and removing against the several seatholders, on the ground, that, by the conditions of the subscription, no assignees or heirs of original subscribers, were entitled to possess at the original rent, unless they had ac-

quired these rights previous to the tacks coming to an end, by the subscription money being paid up, and unless they were related to the subscribers. In defence it was maintained, that a right was, by the agreement, created in the original subscribers, and in their heirs and assignees in perpetuity, of possessing the church-seats at the original rent; or, at least, that the magistrates, by entering repeated assignations to strangers in the rent-book of the church, and continuing to accept the low rent, had homolgated their rights; and, (separatim for certain individuals), that they had obtained their assignations from original subscribers previous to the expiry of the tacks, or that their rights had been specially confirmed by the magistrates. The Lord Ordinary decerned in terms of the libel, and the Court adhered, in so far as the interlocutor decided the general principle, but remitted to hear parties as to the special cases.

Their Lordships were of opinion, that the heirs and assignees entitled to possess at the original rent were those only who had succeeded, or, (being relatives of the subscribers), had obtained assignations during the currency of the tacks, before they expired, by the paying up of the money advanced; and that the tolerance on the part of the magistrates did not now preclude them from insisting in the present action.

James Smyth, W. S.—D. Home, W. S.—Agents.

G. Ewing, Advocator.—*Maidment.*
Dr. J. Hare, &c. Respondents.—*Cuninghame.*

No. 45.

Nov. 27, 1822.

Second Division.
Bill-Chamber.
Lord Bannatyne.
M'K.

Process—Jurisdiction—Act 1663, c. 9—20. Geo. II, c. 43.—The Lord Ordinary refused, as incompetent, a *bill* of advocation of a Sheriff's interlocutor, decerning for payment of a sum under £12 sterling, in an action against the advocator, concluding for a sum above £12. The Court recalled the interlocutor, and remitted to judge on the merits.

D. Brashe,—A. Manners,—Agents.

Culcreuch Cotton Company, Advocators.—*Moncreiff—J. Henderson, Junior—Speirs.*
D. Mathie, Respondent.—*Forsyth.*

No. 46.

Nov. 27, 1822.

Second Division.
Lord Pitmilly.
M'K.

Title to Pursue.—In an advocation of a judgment of the Magistrates of Glasgow, it was objected to the instance, (after the cause had come into the Inner House), that the original action, and the advocation, were raised in the name of the 'Culcreuch Cotton 'Company,' by which name, it was contended, the company had no title to pursue. The Court considered this objection to the instance to be fatal; but, of consent of the respondent, sisted process till a supplementary summons, in name of the individual partners, should be raised.

Their Lordships held, that there was a clear distinction between the case where a mercantile company sued under its *proper firm*, by which it granted obligations, (as Douglas, Heron, and Company, or the like), and where it sued under a mere descriptive name or denomination, as in the present case.

Gibson, Christie, & Wardlaw, W. S.—Geo. Napier,—Agents.

No. 47. R. NEIL and D. MUCKLE, Suspenders.—*Graham Bell.*
G. PEAT, Charger.—*More.*

Nov. 28, 1822.

FIRST DIVISION.
Bill-Chamber.
Lord Meadowbank.

Statute, 47. Geo. III, c. 29—Jurisdiction.—This was a question as to passing a bill of suspension and liberation. Neil and Muckle having been convicted by a justice of peace court of violating the statute 47. Geo. III, c. 29, relative to the protection of the fishing in the Tweed during close time, warrant was issued against them, under which the penalty was levied from the one, and the other was imprisoned. Of this warrant they complained, by bill of suspension, on the ground of various irregularities in the course of the procedure. Peat, at whose instance the prosecution had been raised, objected, 1. that this being a criminal matter, the Court had no jurisdiction; and, 2. that the bill was incompetent, as a permission was given by the statute to appeal to the quarter-sessions, whose determination, it is declared, 'shall be binding and conclusive to all intents and purposes whatsoever, and no proceeding to be had touching the conviction of any offender or offenders against this act, or any order made, or other matter or thing to be done or transacted in, or relating to the execution of this act, shall be vacated or quashed for want of form, or be removed by certiorari, or any other writ or process whatsoever.' The Court, on the report of the Lord Ordinary, passed the bill to try the question.

Suspender's Authorities.—(1.)—1. Ersk. 3, 21; Deas, Feb. 7, 1764, (7684); Kerr, Nov. 29, 1774, (7420); Mair, July 14, 1778, (7421); M'Arthur, Nov. 24, 1789, ( ); Brown, Dec. 12, 1789, ( ); Wilkie, July 10, 1789, ( ); Berry, Jan. 17, 1809, (F. C.); Johnstone, May 15, 1809, (F. C.); Brown, Feb. 21, 1818, (Not rep.); (2.)—1. Ersk. 2, 7; Lord Prestongrange, Jan. 8, 1756, (7350); Countess of Loudon, May 28, 1793, (7396);

Dawson, Feb. 18, 1809, (F. C.); Young, June 28, 1814, (F. C.); Campbell, Summer Session 1820, (Not rep.); Mair, June 7, 1822, (Ante, vol. I, No. 521).

Charger's Authorities.—(1.)—Berry, Jan. 17, 1809, (F. C.); Meek, June 5, 1812, (F. C.)

W. LANG, W. S.—W. SMITH,—Agents.

R. SCRUTON and Others, Pursuers.—*Moncreiff*—*Skene*—*Speirs.* No. 48.

J. CATTO and Others, Defenders.—*Jeffrey*—*More.*

Jury Court—*New Trial*—*Verdict in Absence.*—Scruton and others having raised an action against Catto and others before the Court of Admiralty, it was remitted to the Jury Court, where, after evidence had been led, a verdict was returned for the pursuers. The Jury Court set aside this verdict; granted a new trial; appointed it to take place at Aberdeen at the Spring Circuit, which was notified by the pursuers to the defenders; and afterwards refused a motion by the pursuers to postpone the trial, made on affidavits, that some important witnesses were absent. On the morning of the trial at Aberdeen, a similar motion was again made by the pursuers, but was dismissed. Their counsel and agent then left the Court; and a special jury having been impannelled, they, under the direction of the presiding Judge, found for the defenders, 'in respect the pursuers did 'not support their case by any evidence.' A new trial was applied for, but refused by the Jury Court; and a bill of exceptions having been presented and reported to the Court of Session, that judgment was affirmed.

Nov. 28, 1822.

FIRST DIVISION.

D.

J. HILL—CARNEGY & SHEPHERD, W. S.—Agents.

No. 49. FRANCIS M'LENNAN, Charger.—*Moncreiff—J. W. Dickson.*
JOHN ORD, Suspender.—*Matheson.*

Nov. 28, 1822.
SECOND DIVISION.
Lord Cringletie.
F.

Repetition.—M'Lennan, a tenant, made certain payments of rent to Ord, factor on the estate of Tarradale, and held a receipt for £72, for which sum Ord gave M'Lennan credit in accounting with the landlord when removed from the factorship. M'Lennan alleging, that over and above this £72, he had indorsed a promissory-note for £20 to Ord, who obtained payment of it, for which Ord had not given him credit, raised action before the Sheriff for repetition. The Sheriff decerned against Ord, who suspended; but the Lord Ordinary and the Court, holding it sufficiently proved that the proceeds of this promissory-note constituted part of the payment of £72 for which the receipt was granted, remitted to assoilzie the suspender.

JAS. CRAWFORD, W. S.—JAS. M'DONNELL, W. S.—Agents.

No. 50. T. BAILLIE, Pursuer.—*Forsyth.*
P. HALKERSTON, Defender.—*Fullerton.*

Nov. 29, 1822.
FIRST DIVISION.
Lord Alloway.
D.

In this case, no general question occurred. Halkerston was indebted to the late J. Craw, and a competition having arisen among his creditors for the fund, a multiplepoinding was raised, in which Halkerston was ordained to consign the fund in medio. He resisted this, alleging that he owed nothing; but the Court being satisfied that he was debtor, adhered, and found him liable in expences.

T. BAILLIE—R. STUART—Agents.

Mrs. CORBET and Others, Pursuers.—*Moncreiff—Brown—Currie.*
AGNES WILSON and Others, Defenders.—*Cranstoun—Cockburn—Ro. Thomson.*

No. 51.

Nov. 29, 1822.

FIRST DIVISION.

H.

Expences.—The defenders had been assoilzied, with expences, from an action of reduction, raised by the pursuers; and the sole question now was, whether the auditor had justly struck off a part of their account? The Court partly sustained, and partly repelled the objections.

C. BALFOUR, W. S.—J. MOWBRAY, W. S.—Agents.

TOD and WRIGHT, W. S. Pursuers.—*M'Farlan—Cranstoun.*
ROBERT BOYD, Defender.—*Jeffrey—J. Wilson, jun.*

No. 52.

Nov. 29, 1822.

SECOND DIVISION.

Lord Pitmilly.

M'K.

Process—Summons.—Tod and Wright raised summons against 'Robert Boyd in Stow,' who died previous to citation. A marginal alteration was made on the summons, after it was signeted, to make it apply to the defender, the son of Robert Boyd in Stow, who was, accordingly, cited as a party. The Court, altering the interlocutor of the Lord Ordinary, held that there was no warrant to cite, and assoilzied the defender, reserving to the pursuers to bring a new action.

TOD & WRIGHT, W. S.—W. MERCER, W. S.—Agents.

No. 53. R. M'GAVIN and COMPANY, Advocators.—*Greenshields—Moncreiff.*
W. DUNN, Respondent.—*Jeffrey—Grahame.*

Nov. 29, 1822.
SECOND DIVISION.
Lord Cringletie.
M'K.

Sale.—Dunn bought from M'Gavin and Company, a certain quantity of cotton, to be delivered in Glasgow, but afterwards refused to receive it, alleging, that, at purchasing it, they represented to him that the cotton was then shipped, or in the act of being shipped at Liverpool, while, in point of fact, it was not shipped for ten days thereafter. M'Gavin and Company pursued Dunn for implement of the bargain, before the magistrates of Glasgow, who, after allowing a proof, assoilzied Dunn. In an advocation by M'Gavin and Company, the Lord Ordinary remitted simpliciter; but the Court, (by a majority), being of opinion that Dunn had not made out his allegation, advocated the cause, and decerned in terms of the libel.

C. J. F. ORR, W. S.—W. & A. G. ELLIS, W. S.—Agents.

No. 54. W. BROCK, (Trustee on A. Newbigging and Co.'s Estate), Pursuer and Charger.—*Cranstoun—Jeffrey—D. M'Farlane.*
R. B. CABBELL, &c. (for Glasgow Bank), Defenders and Suspenders.—*Clerk—Moncreiff—Ivory.*

Nov. 29, 1822.
SECOND DIVISION.
Lord Cringletie.
M'K.

Tack—Assignation of, in security.—Archibald Newbigging held leases of the Denovan works, and other subjects, for behoof of A. Newbigging and Co. (of which concern he was a partner), who occupied the premises as a bleachfield and printfield. The

Company granted to the Glasgow Bank an assignation to the tacks, and to the machinery on the property, ex facie absolute, but in reality in security of advances. The Bank intimated the assignation to the landlord, and executed a missive of sub-tack, completely informal, and without stipulating for any rent, in favour of Newbigging and Co., who continued their possession unchanged. Although mention was made of the assignation in the accounts of the landlord's factor, yet Newbigging and Co. paid the rents to the landlord as formerly; and it did not appear that they ever paid any rent as subtenants to the Bank, but merely the discount on such bills as were cashed for them by the Bank on the faith of this security. After thus possessing for three years subsequent to the assignation, Newbigging and Co. were sequestrated; and the trustee on their estate having attempted to sell the machinery on the premises, the Bank brought a suspension and interdict. The trustee then raised an action of declarator of the invalidity of the assignation to the Bank, and of his right to the leases, &c. as trustee for behoof of the creditors. These processes having been conjoined, the Lord Ordinary suspended the letters, and assoilzied the defenders; but the Court, holding that there had been no possession, either natural or civil, on the part of the Bank, subsequent to the assignation, found, 'that, in the 'whole circumstances of the case, the assignation 'founded on cannot be effectual against the trus-'tee for the creditors of the cedents;' and they, therefore, in the suspension, found the letters orderly proceeded, and, in the declarator, decerned in terms of the libel.

The Court considered this case to be perfectly distinct

from that of Yeoman, where there was a deletion of the cedent from the Buccleuch rental-books, and an insertion of the assignee as tenant, and where a regular sub-tack was granted to the cedent.

Pursuer's Authorities.—2. Craig, x, 9; 2. St. ix, 4-7, and 3, ii, 6; Dirl. 223, 295-6; 2. Ersk. vi, 25; 1. Bell, 5, 51, 187; Bell on Leases, 340; Wallace, Jan. 4, 1751; (Elchies, No. 17, v. Tack).
Defenders Authorities.—Bell on Leases, 361; Yeoman, Feb. 2, 1813, (F. C.)

GIBSON, CHRISTIE, & WARDLAW, W. S.—T. JOHNSTONE,—Agents.

No. 55.

SIR J. STIRLING, Petitioner.—*Moncreiff—Skene.*
A. CHRISTIE, Respondent.—*Cranstoun—Bruce.*

Nov. 30, 1822.

FIRST DIVISION.
H.

Road-Statute—Arrestment.—By the Berwickshire road-act it is declared, that the trustees shall pay into the Bank of Scotland the value of any entailed lands taken by them for the purposes of the act, in order that the money may, by a warrant from the Court of Session, on a summary petition by the party having right to the lands, be applied in the manner there directed. The trustees having appropriated part of the entailed estate of Renton, Sir John Stirling, the heir in possession, raised an action of damages against them, which they resisted. During its dependence Sir John died, after which it was carried on by his trust-disponee, and by his son, Sir Samuel, who succeeded to the entailed estate. Christie, a creditor of Sir John, then instituted an action against Sir Samuel and his brother and sisters, as representing their father, on the dependence of which he executed an arrestment against them in the hands of the trustees. As they did not represent their father, decree cognitionis tantum was pronounced. In the

meanwhile, decree for a certain sum was obtained against the road-trustees. They brought a multiplepoinding, in respect of the arrestment; but, before it came into Court, they were obliged to consign the sum decerned for, in terms of the statute Sir Samuel, as heir of entail, having presented a summary petition, for a warrant to uplift the consigned money, it was opposed by Christie, who alleged that the fund was attached by his arrestment, and was the subject of competition in the multiplepoinding. To this it was answered, 1. that his arrestment was inept, as it was directed, not against the funds of Sir John, his debtor, but against those of his children, who did not represent him; 2. that there was no fund in the hands of the trustees; and, 3. that it must be disposed of in terms of the statute. The Court granted the warrant.

A. PEARSON, W. S.—G. TURNBULL, W. S.—Agents.

J. STEWART and J. WHITE, Petitioners.—*Buchanan.* No. 56.
J. M'GAVIN, (Trustee on their Sequestrated Estate), Respondent.—*Greenshields.*

Nov. 30, 1822.

SECOND DIVISION. M'K.

Bankrupt—Trustee.—On an application from the petitioners, praying the Court to ordain the respondent, the trustee on their sequestrated estates, to grant a certificate of the concurrence of the requisite number of creditors, in order to enable them to apply for a discharge, the Court appointed the trustee to report on the amount of the concurring creditors. He, accordingly, gave in a report, from which it appeared that there was not the requisite concurrence. The petitioners then offered to instruct that the trus-

tee had ranked certain creditors whose claims were bad, as non-concurring, and had rejected others who had concurred, whose claims were good, and that, in reality, the petitioners had the requisite concurrence of true creditors. But the Court dismissed the complaint in hoc statu, seeing that the judgment of the trustee, as to the claims entitled to be ranked, must be held good, till altered by the Court, on a regular petition and complaint against his determination.

THOS. JOHNSTONE,—C. J. F. ORR, W. S.—Agents.

No. 57.

G. GOUDIE, Suspender.—*Forsyth—Cranstoun.*
EAST LOTHIAN BANK, Chargers.—*Clerk—Hunter.*

Dec. 3, 1822.

FIRST DIVISION.
Bill-Chamber.
Lord Kinedder.
H.

Meditatio Fugæ Warrant.—William Borthwick, cashier of the East Lothian Bank, was engaged in various commercial speculations, with his brother, Bruce Borthwick, who resided in Prussia, and the suspender, Goudie, who conducted the business at Dunbar. Having embezzled large sums from the Bank, Borthwick, in April 1822, absconded and went abroad. On the day of his flight, Goudie discounted a bill for £1,000, which he gave to him; and Goudie's son, who was a clerk in the Bank, attended at a remote place at midnight, with the horse, by means of which Borthwick fled. In this embezzlement and escape, the Bank, alleging that Goudie was participant, and that the funds had been appropriated to the purposes of the joint trade, obtained, after a precognition, a warrant of imprisonment against him, on the 23d of April, till liberated in due course of law. He was immediately thereafter liberated, on bail, for £200; and continued to reside within Scotland, without at-

tempting to fly, uplifting the funds of the concerns, part of which he delivered to the Bank, on an obligation to account to those having right to it, and part to a magistrate. The Bank then instituted an action against him and his partners, for £30,000; and, on the 8th of May, presented a petition to the Sheriff, accompanied by the precognition for a warrant to arrest and imprison him as in meditatione fugæ. It was there stated, 'that from the magnitude of the 'debt due to the Bank; from the fraudulent manner 'in which it has been contracted; from the said Bruce 'Borthwick, one of the defenders, being forth of the 'kingdom; from the said William Borthwick having 'lately absconded, and left the kingdom; and from 'the said George Goudie being under a criminal 'charge for his conduct in these fraudulent transac-'tions, the petitioners have good reason to believe 'that the said George Goudie is in meditatione fugæ, 'and about to leave Scotland, whereby the debt due 'to the petitioners is in danger of being lost.' And one of the partners of the Bank deponed, 'that he 'has good reason to believe that George Goudie, 'within designed, is, as an individual, or as a partner 'in all, or one or more of the copartnerships men-'tioned in the petition, justly addebted to the East 'Lothian Banking Company in the sum of £30,000; '—that he has good reason to believe, upon the 'grounds and circumstances stated on the third page 'of the foregoing petition, that the said George 'Goudie is in meditatione fugæ, and about to leave 'Scotland, whereby the debt due to the Bank is in 'danger of being lost.' The Sheriff granted warrant, and Goudie was, after examination, imprisoned. He presented a bill of suspension and liberation, in

which he maintained, that it was irregular to produce the precognition,—that the oath was not one of verity,—that it was not sufficient to justify a suspicion of flight; and that the circumstances were exclusive of this idea; for, although he had sufficient opportunity, he did not abscond along with Borthwick,—that he remained quietly at Dunbar,—that after being imprisoned on a criminal charge, he found bail to stand his trial, and was liberated,—that, notwithstanding, he did not fly, but travelled at large within the country;—and that he did not apply the funds uplifted by him, to enable him to escape. The Lord Ordinary refused the bill, and the Court at first adhered; but afterwards, by a majority, altered and remitted to pass the bill.

Suspender's Authority.—2. Mackenzie, 41.

Chargers Authorities.—4. Instit. 2, 1. 2, De Satisdat.; 13. Cha. II, c. 2; Balfour, 32; 3. Blackst. 279; 4. St. 47, 23; 1. Ersk. 2, 21; Mason, Nov. 30, 1665, (8547); Nelson, Jan. 18, 1678, (8548); Tasker, March 4, 1801, (Ap. Med. Fuge, No. 1); Scudamere, June 3, 1797, (8559); Anderson, Nov. 26, 1814, (F.C.)

J. Mackenzie—Gibson & Oliphant, W. S.—Agents.

No. 58. Forbes' Trustees, Petitioners.—*Moncreiff—Buchanan.*

L. M'Intosh and Others, Respondents.—*Clerk—Cockburn—Maitland.*

Dec. 3, 1822.

First Division. D.

Execution Pending Appeal.—On the 8th July 1820, the Court found, in this case,* inter alia, 'that 'the whole incumbrances affecting the lands in question must be cleared and paid off, simul et semel, 'with the payment of the price;' and remitted to Mr. Russell, W. S. 'to ascertain the extent of the

* See ante, vol. I, No. 546.

'incumbrances; and, in case the same do not exceed 'the amount of the price, authorize Mr. Russell to 'uplift the price consigned in the Bank of Scotland, 'and grant warrant accordingly; and, in case he 'shall be of opinion, that the incumbrances exceed the 'said price, authorize him to intimate the same to 'the trustees, requiring them to discharge the same, 'and to lodge the said discharge or discharges in 'Mr. Russell's hands, within such time as he shall ap-'point; and, upon this being done, authorize Mr. 'Russell to carry the transaction into execution, 'in terms of these findings.' Mr. Russell, in consequence of certain objections by M'Intosh, made a report to the Court, who approved of it; of new remitted to him to carry it into effect; and found expences due. Against this judgment, M'Intosh having appealed, Forbes' trustees prayed,—1. That Mr. Russell might be authorized to proceed in the meanwhile; and, 2. For interim execution as to the expences. The Court refused the first prayer, in respect that ulterior proceedings, in foro, were necessary; but granted the second.

Respondent's Authorities.—Moffat, July 7, 1813, (F. C.); Brodie, Nov. 22, 1814, (F. C.); Earl of Mansfield, March 2, 1815, (F. C.)

H. M'Queen, W. S.—Æ. M'Bean, W. S.—Agents.

J. Purves, Pursuer.—*Moncreiff—Robertson.*
J. Rutherford, Defender.—*Cranstoun—Graham Bell.*

No. 59.

Dec. 3, 1822.

First Division.
Lord Gillies.
D.

Landlord and Tenant—Lease.—This was a dispute between an outgoing and incoming tenant;—the outgoing tenant claiming a certain sum as the value

of fallow-ground, left by him;—the incoming tenant contesting this, and, on the other hand, insisting for damages for overcropping. After several reports from agricultural persons, in one of which, the claim for fallow was sanctioned, on the ground that the tenant was entitled to take another crop instead of leaving in fallow, while the others negatived the averment of a special usage; the Lord Ordinary decerned for the value of the fallow, in favour of Purves, the outgoing tenant, and the Court adhered.

D. Horne, W. S.—S. C. Sommerville, W. S.—Agents.

No. 60.

James and Mary Renny.—*Lumsden.*
R. Crosbie and Others.—*Henderson.*
Competing.

Dec. 3, 1822.

First Division.
Lord Meadowbank.
D.

Clause—Succession per Stirpes vel per Capita.—Robert ~~Rennie~~ Wilson had a family consisting of a son and two daughters. The son, William, had gone abroad, and had not been heard of for forty years. One of the daughters married Mr. Rennie, by whom she had two children, James and Mary; and the other a Mr. Crosbie, by whom she had a family. Mrs. Rennie died; and, in 1806, Robert Wilson made a will, by which he divided his estate into three parts, one of which he bequeathed to his son, William, if in life, and, if dead, to be liferented by Mr. and Mrs. Crosbie, after whose deaths, he appointed that 'the said third share shall be equally 'divided among the children procreated or to be pro-'created of their marriage; and the said Mary and 'James Rennie, and the survivors of them, share and 'share alike.' After the testator's death, a dispute arose between the Rennies and the Crosbies, whether

the third ultimately destined to them, was to be divided per stirpes vel per capita. In a multiplepoinding, the Lord Ordinary, after providing for the security of the money, in the event of the appearance of the son William, found, that it 'is destined thereafter per capita, to the children of the said Mrs. Crosbie, and Mary and James Rennie, and the survivors, share and share alike.' To this interlocutor the Court adhered.

The Judges rested on the words 'survivors of them, 'share and share alike.'

R. STUART,—F. WILSON, W. S.—Agents.

R. BRUNTON, Advocator.—*Moncreiff—More.*
W. ANGUS, Respondent.—*T. W. Baird.*

No. 61.

Dec. 3, 1822.

SECOND DIVISION.
Lord Cringletie.
F.

Triennial Prescription.—W. Angus, as executor of his brother Gilbert, pursued Brunton before the Sheriff for a sum alleged owing to the deceased on the accounts between them. Brunton admitted, and offered to pay a certain amount, but pleaded compensation to the extent of £8 : 8 : 5, which sum he alleged the deceased owed him for goods furnished in 1805. Angus contended, that this claim was cut off by the triennial prescription; and, further, that Brunton had, in 1812, granted the deceased a receipt 'in full of old accounts.' The Sheriff decerned against Brunton, who advocated. The Lord Ordinary repelled the reasons of advocation; but the Court being satisfied, from the books of the deceased, that the receipt in 1812 did not include this article, and that it had not been paid, advocated the cause, and found, 'that the plea of prescription cannot be sustained in the special circumstances of the case, and

'that the cause resolves itself into an accounting be-
'tween the parties, and that the advocator was en-
'titled to credit for the disputed article of £8 : 8 : 5.'

Advocator's Authority.—Leslie, Nov. 15, 1808, (F. C.)

JOHN JAMESON—THOS. RUSSELL,—Agents.

No. 62. CLAUD RUSSEL, (J. CAMPBELL'S Trustee), Pursuer. —*Moncreiff—Keay.*
EARL of BREADALBANE, Defender.—*Clerk—Jardine.*

Dec. 3, 1822.

SECOND DIVISION. Lord Pitmilly. M'K.

Tack—Assignation in Security—Bankrupt—Act 1696, *c.* 5.—Mr. J. Campbell, W. S. and Lord Breadalbane, were the sole partners of a company which had obtained certain long leases of slate and marble quarries from his Lordship's predecessors. An overseer was employed at the quarries to superintend the works, who transmitted the proceeds to Mr. Campbell, as agent for Lord Breadalbane. In 1813, Mr. Campbell executed, in favour of his Lordship, a conveyance (in security for money advanced) of his interest in the concern, and in the leases and stock of the company; but he continued to receive the proceeds, and, as formerly, gave Lord Breadalbane credit in his books for one-half only of the profits. On the 18th of June 1818, the overseer was directed, by Mr. Campbell's son, to make the whole remittances in future to Lord Breadalbane's factor. On the 26th June, a notorial intimation of the assignation in 1813 was given to the overseer, and a requisition to him, to hold the possession in future for his Lordship, and a second intimation and requisition was made on the 31st June thereafter. Mr. Campbell was rendered bankrupt with-

in sixty days of these two last intimations, and executed a trust-deed, for behoof of his creditors, in favour of Mr. Russel, who raised action of reduction of the assignation, on the ground, that the intimation, being within sixty days of the bankruptcy, was struck at by the act 1696. Lord Breadalbane pleaded, that being landlord and sole partner of Campbell, the assignation was completed by delivery of the deed; and that, at any rate, by the directions to the manager on the 18th June, more than sixty days before the bankruptcy, the possession was changed, and, thereafter, held for him alone. The Lord Ordinary, 'in respect the granter of the conveyance or assignation of the 23d June 1813 was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy,' reduced the same. To this interlocutor the Court adhered, 'in so far as it finds, that, in respect the granter of the conveyance or assignation challenged was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy, the assignation was not completed, to the effect of giving a preference to the assignee, in a question with the creditors of the cedent; but, before answer, remit to his Lordship to hear parties farther on the conclusions of the libel, and to do as he shall see cause.'

Pursuer's Authorities.—Kilk. 143; 3. Erak. iii, 5.

Defender's Authorities.—3. St. 1, 9; 2. Bank. 193; 3. Erak. v, 4; Montgomery, July 27, 1673, (841); E. of Argyle, Dec. 14, 1676, (842); Maxwell, Dec. 20, 1758, (1242.)

VANS HATHORN, W. S.—H. DAVIDSON, W. S.—Agents.

No. 68. J. V. AGNEW, Petitioner.—*Jeffrey—Robertson.*
EARL of STAIR and Others, Respondents.—*Cranstoun—Thomson—A. Bell.*

Dec. 3, 1822.

SECOND DIVISION.

B.

Process—Application of Judgment of House of Lords.—Mr. Agnew presented petitions, praying the Court to apply certain judgments of the House of Lords, in two causes in which he was appellant, whereby that House, reversing the judgment of the Court of Session,* found him entitled to have restored to him, as heir of entail, certain lands, forming parts of the entailed estate of Sheuchan and Barnbarroch, as having been sold contrary to the entail, and to repetition of the rents since the period of his accession. The Earl of Stair and others, who were respondents in the appeal, moved the Court to supersede procedure, on the ground that they intended to apply to the House of Lords to be reheard on the cause, which, from the judgment having been pronounced at the close of the session, they were precluded from doing before Parliament rose. Having lodged a minute to that effect, the Court, after a hearing in presence, on the competency of the procedure, superseded 'the further advising of the petition till the tenth 'sederunt-day after the meeting of Parliament for 'dispatch of business.'

The majority of their Lordships were satisfied that an application to the House of Lords for a rehearing after judgment was a competent proceeding;—that the respondents could not have petitioned for that purpose before the rising of Parliament;—and that there was nothing in the terms of the judgment, or in the practice of this Court, which obliged them to apply the judgment instanter, and without delay.

* June 2, 1818, (F. C.)

Respondents Authorities.—(Competency of Rehearing); Order of H. of L. Feb. 14, 1694; Journals, vol. XV, p. 478; Devereux v. Phelan. 1732; Journ. xxiv, 152, &c. 388.

Coney, 1691; Journ. xv, 4, 15, 23; Hungerford v. Pollard, 1691, 63–105, 117; Luttrel v. Lord Irnham, 1778, xxxv, 357, 453–9.

(Practice as to immediate application), Scott v. Brodie, March 2, 1803, (F. C.); Geddes, Nov. 16, 1816, (F. C.); Hume Campbell, July 1743, (14968.)

J. S. Robertson, W. S.—J. Bell, W. S.—Agents.

No. 64.

J. Donald, &c. Pursuers.—*Clerk—Forsyth.*
Robertson, Reid, and Others, Defenders.—*Cranstoun—Cockburn.*

Dec. 5, 1822.

Second Division.
Lord Pitmilly.
B.

Wrongous Imprisonment.—A complaint was presented to the magistrates of Glasgow by the defenders, cabinet-makers in Glasgow, and the procurator-fiscal for the public interest, against the pursuers, journeymen cabinet-makers, charging them with having entered into a criminal conspiracy to raise the rate of wages, and with having assaulted and prevented from working certain workmen of the defenders who were willing to be employed at the reduced rates. They were found guilty by the magistrates, who imposed on them fines, and granted warrant for imprisonment till paid. The pursuers presented a bill of suspension and liberation to the Court of Justiciary, on which this sentence was pronounced.—'In respect 'of the looseness and inaccuracy of the libel, the 'irregularity of proceeding, and founding upon what 'are termed the declarations of the accused, though 'not taken before a magistrate, and that the sums 'awarded in name of damages and solatium are ex-'cessive in the circumstances of the accused, and in

'the absence of proof of any actual damage, suspend 'the sentence of the magistrates of Glasgow com- 'plained of, and grant warrant for the liberation of 'the complainers. But, in respect of the facts dis- 'closed in the proof, as to the conduct of the com- 'plainers, find no expences due, and decern.' The pursuers having suffered an imprisonment of two months, raised an action for reparation, and for damages in solatium of the injury done them by the imprisonment on the warrant of the magistrates. The Lord Ordinary found the defenders liable in the amount of damage actually sustained by the pursuers, and remitted to the Jury Court to assess the same. The Court, by a majority, adhered, except as to the remit to the Jury Court, which was recalled, and the cause remitted to the Lord Ordinary, to hear parties as to the best mode of taking the proof of the damage.

Pursuers Authorities.—Fullerton, Feb. 19, 1715, (7503); Anderson, Jan. 3, 1750, (13949); Graeme, March 8, 1765, (13923); Hunter & Co. June 29, 1809, (F. C.); Anderson, Nov. 26, 1814, (F. C.)

D. FISHER—THOS. MEGGET,—Agents.

No. 65. J. MILNE, and Others, Pursuers.—*Gordon—Jameson.*

Mrs. E. INNES or FARQUHARSON and HUSBAND, Defenders.—*Jeffrey—Robertson.*

Dec. 5, 1822.

SECOND DIVISION. Lord Cringletie. M'K.

Testament—Legitim.—Innes died, possessed of about £1,800. He left a will executed by himself, bequeathing the liferent of his property to his widow, and declaring that, after her death, it should be di-

vided in these shares. viz. £600 to Milne, &c. children of a daughter predeceased, and the rest among the family of his surviving daughter, Mrs. Farquharson. His widow enjoyed the liferent for 12 years, and, on her death, Mrs. Farquharson, as executor, qua nearest of kin, entered into possession of her funds, and those of her father. Milne, &c. raised action for payment of the legacies under Innes's will, and certain other legacies left them by his widow, and Mrs. Farquharson instituted a reduction of the will, on the ground that he had tested upon the legitim and jus relictæ, which she claimed, as the only surviving child, and as her mother's executor. These actions were conjoined. The Lord Ordinary found, that Innes's widow having enjoyed the liferent of her husband's whole funds under his will for 12 years after his death, had barred her own right, or that of her executor to challenge it,—that the testator having left no more than the dead's part to Milne, &c. Mrs. Farquharson had no interest to quarrel it, and he accordingly dismissed the reduction; and, in the action at the instance of Milne, &c. decerned in terms of the libel, 'reserving to the defenders to insist in any 'action of reduction against their own children, in 'so far as such action is connected with the matter 'in this cause;' and the Court adhered.

JOHN GORDON, W. S.—ALEX. NAIRNE—Agents.

No. 66. Æ. MORRISON, Suspender.—*Moncreiff—Skene.*
HUNTER and Ross, Chargers.—*Greenshields—Jeffrey.*

Dec. 5, 1822.

SECOND DIVISION.
Lord Pitmilly.
F.

Title to Pursue—Compensation.—Morrison was indebted to a company, of which the partners were Norman and Robert M'Donald. Norman died, leaving the company bankrupt, and the creditors authorized Robert to wind up the affairs, and collect the debts of the concern. Robert raised action, 'as only surviving partner of the late concern, &c.' and, 'as such, having right to receive the outstanding debts of 'said concern,' against Morrison, for payment of the debt owing by him to the company. Morrison pleaded compensation on a debt due him by Robert, as an individual, and raised a counter-action. The magistrates of Glasgow, in the action against Morrison, found, that the jus exigendi vested in Robert M'Donald, as surviving partner, was in trust for the creditors, and that Morrison, in consequence, was not entitled to plead a debt due by him as an individual, in compensation, and decerned against him. Thereafter, an agreement was entered into between Morrison and M'Donald, whereby they mutually discharged their actions against each other, and the decree of the magistrates was allowed to become final. Compearance was now made for Hunter and Ross, as a 'committee appointed by the creditors to direct M'Donald in 'the winding up, and distribution of the affairs,' &c. who insisted for extract of the decree against Morrison, in their names, as representing the creditors,

and contended, that the agreement, pendenti lite, was not valid in law to defeat the right of the creditors. Morrison pleaded, that Ross and Hunter had no title to obtain decree in an action raised by M'Donald in his individual name, and that the creditors had no right to exact the debt in question, having acquired no title to the funds of the concern by diligence, deed of transference, confirmation as executors-creditors of Norman M'Donald, or otherwise. The magistrates allowed extract of their decree to go out, in name of Hunter and Ross, who charged thereon. Morrison suspended. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

M'Millan & Grant, W. S.—Mack & Wetherspoon, W. S.—Agents.

R. M'Lachlan, Pursuer.—*Cranstoun—Menzies.*
Crawford Tait, Defender.—*Tait.*

No. 67.

Dec. 6, 1822.

Second Division. Lord Pitmilly. F.

Superior and Vassal—Non-Entry.—Mr. M'Lachlan pursued declarator of non-entry against Mr. Tait, who had purchased certain lands possessed by his author, and his predecessors, under titles held in feu of the pursuer. In defence, Mr. Tait pleaded, that he had a personal right to insist against the pursuer for a conveyance of the superiority, and that, at any rate, he was only bound to pay a duplicando of the feu-duty, and not a year's rent, for entry. The Lord Ordinary decerned in the declarator, and the Court adhered.

The Court declined to enter on the merits of Mr. Tait's defences, in respect that his author, (who was deceased), held the lands under Mr. M'Lachlan, and the fee was vacant.

R. M'Kenzie, W. S.—Tait, Young, & Lawrie, W. S.—Agents.

No. 68. R. and J. Hotchkis, Pursuers.—*Fullerton—Rutherfurd.*
Walker's Trustees, Defenders.—*Walker.*

Dec. 6, 1822.

Second Division. Lord Pitmilly. F.

Superior and Vassal—Mid-Superiority.—The late Marquis of Tweeddale held the barony of Pinkie, property and superiority, undivided. He feued out part of the lands at a feu-duty of about £27. To these feus, and to the dominium directum, Walker acquired right; and, with the view of conveying the superiority, and of constituting a vote in favour of Stewart, and, at the same time, to reserve the feu-duties, a transaction was entered into between these parties, by which it was agreed that Walker should dispone the dominium directum, by an ordinary disposition, to Stewart, excepting from the warrandice the feu-rights, at a price corresponding to the value of the vote; and that Stewart should redispone to Walker the same right, to be held of Stewart, for payment of a duty of 15*s*. This was, accordingly, carried into execution; and although it had the effect to interpose a mid-superior, yet the vassals did not only not object, but entered with Walker as their superior. Stewart disponed his right to Sir William Fettes, and it was acquired from him by the pursuers, who raised an action of reduction of the mid-superiority created in

favour of Walker, as illegal. The Lord Ordinary, in reference to the defences, found, 'that the disposition of Mr. Stewart to the late Mr. Walker, by which Mr. Stewart interposed a new superior between himself and his former vassals, can only be objected to by the vassals, and as having been granted without their consent; and, in respect that the vassals do not object, but, on the contrary, entered with Mr. Walker, and have paid their feu-duties to him and his trustees since the date of his disposition in 1790, Mr. Stewart and Sir William Fettes respectively having at the same time accepted of the feu-duty of 15s. from Mr. Walker and his trustees;' found, 'that the pursuer has no right to demand reduction of the defender's titles on these grounds;' and, therefore, repelled the reasons of reduction. The Court adhered.

Pursuers Authorities.—2. St. iv, 5; 2. Bank. iv, p. 618; 2. Erak. v, 4; Douglas, Jan. 30, 1671, (9306).

Defenders Authorities.—2. Bank. iv, 5; 2. Erak. v, 4; Archbishop of St. Andrews, Dec. 1682, (15015); Wight, p. 228; Cases, Dict. voce Sup. and Vassal, v. 2; Stat. Rob. III, c. 4; Hume, Jan. 22, 1794, (15077.)

R. & J. Hotchkis, W. S.—Walker, Richardson, & Melville, W. S.—Agents.

H. Buist and Others, Petitioners.—*Cranstoun—J. Henderson, Junior.*
A. Thomson, Respondent.—*Clerk—A. Murray.*

No. 69.

Dec. 7, 1822.

First Division.
D.

Bankrupt—Ranking.—Thomson, Gourlay, and Wyllie were joint cautioners to the Bank of Scotland for W. and J. Marshall, agents at Perth. Marshalls became bankrupt, and the claim against the cautioners was about £12,000, but their liability was dis-

puted. Gourlay also becoming insolvent, his estates were sequestrated, and Thomson was chosen trustee. The Bank ranked for the whole sum of £12,000; and Thomson for a separate debt of £6,000. In March 1818, a dividend of 6s. 8d. per pound was struck, and £4,000 were consigned for behoof of the Bank, in the event of the liability of the cautioners being fixed. Thomson claimed the dividend on his private debt of £6,000. This was resisted by the creditors, who contended, that Thomson ought to deduct the £4,000 laid aside for the Bank, under the cautionary obligation, from his debt of £6,000, and rank for the balance, or £2,000. Thomson, on the other hand, maintained, that, as £4,000 was the proper share of the cautionary obligation due by Gourlay, he was not bound to deduct it from his private debt; and that he was entitled to draw the dividend on the full amount of the £6,000; but he conceded, that if, by any future dividend, the Bank should receive more than Gourlay's proper share, then he must deduct one-half of the excess from his ranking, and receive a corresponding dividend. The question having come before the Court, they, after advising memorials, and a hearing in presence, found, (16th November 1820), 'that, in so far as the sum 'or dividend set apart from the trust-estate of Oli- 'ver Gourlay, for answering the claim or debt due 'by him, jointly with the other two cautioners, to 'the Bank of Scotland, shall exceed his third 'share of such debt, the one-half of such excess 'must be deducted from the amount of the debt 'due to Thomson; and that he is only entitled 'to rank on the trust-estate for the balance of 'the debt, after making this deduction, and to

'draw dividends applicable thereto accordingly.' A farther dividend of 5s. being thereafter payable, and £3,000 consigned for the Bank, Thomson deducted one-half of the sum, or £1,500, from his claim of £6,000, and claimed a dividend on the balance, viz. £4,500. The creditors, however, alleged, that the £1,500 ought to be deducted from his debt of £6,000, so as to be imputed as a payment as from *the date of the sequestration*,—that on this sum of £4,500, *all* his dividends ought to be calculated,—and that, as he had drawn under the first dividend, 6s. 8d., on a ranking of £6,000, instead of £4,500, he ought to impute the surplus to the credit of the dividend of 5s. Thomson, as trustee, having refused to do so, Buist and others presented a petition to the Court, in terms of the statute, which, on answers, was refused.

Petitioners Authority.—Cranstoun, May 22, 1798, (2552.)
Respondent's Authority.—Cook on Bankruptcy.

R. Thomson,—Thomson & Fergusson, W. S.—Agents.

John Laing, Advocator.—*Cranstoun—Brown.*
James Muirhead, Respondent.—*Moncreiff—Matheson.*

No. 70.

Dec. 7, 1822.

Second Division.
Bill-Chamber.
Lord Robertson.
M'K.

Nuisance—Edinburgh.—Laing having erected a fire-place and vent in his stable in the Meuse Lane of Young Street, Edinburgh, Muirhead, whose house was immediately behind, applied to the Dean of Guild for an interdict, on the grounds,—1. That as the smoke issued out only seven feet from his windows, it was a nuisance; and, 2. That the erection of the vent was contrary to the plan of the New Town, which declares, 'that Meuse Lanes shall be ap-

'propriated solely for the purpose of building stables, 'coach-houses, and other offices.' The Dean of Guild having granted the interdict, and adhered by a series of interlocutors, Laing presented a bill of advocation, offering, (as he had done before the Dean of Guild), to raise the chimney to such a height as would obviate the nuisance. The Lord Ordinary remitted to the Dean of Guild to ordain Laing so to raise the chimney, and, thereafter, to recal his several interlocutors, but to find no expences due. To this interlocutor, the Court adhered.

Their Lordships held it quite competent to erect fireplaces in offices in Meuse Lanes, without contravening the plan of the town, but refused a petition of Laing's to have expences allowed him, in respect that he ought to have applied to the Dean of Guild before making any alteration on his property.

ANDW. GRAY, W. S.—GEO. VEITCH, W. S.—Agents.

No. 71. ALEXANDER WILKIE, Suspender and Pursuer.—*Dickson—Graham Dalyell.*

THOMAS BAUCHOPE, (Collector for Livingstone Road Trustees), Charger and Defender.—*Forsyth—Cranstoun.*

Dec. 7, 1822.

SECOND DIVISION. Lord Cringletie. F.

Wilkie having been decerned, by decree of the justices of peace, to make payment of a certain sum of road assessment, raised actions of reduction and suspension, alleging, that he did not possess certain lands for which he was charged. The Lord Ordinary and the Court being satisfied that he did, repelled the reasons of suspension and reduction.

GORDON & WILSON, W. S.—JNO. MOUBRAY, W. S.—Agents.

SIR T. G. CARMICHAEL, Petitioner.—*Clerk—Fullerton.* No. 72.
TAIT and FRASER, Respondents.—*Jeffrey—Matheson.*

Witness—Agent.—In the course of a proof by commission, the petitioner offered to adduce as a witness, Mr. Gibson, W. S. the principal partner of Gibson, Christie, and Wardlaw, who were his agents in the cause; and stated, that Mr. Gibson had never personally taken any charge, or had any knowledge of this case. The commissioner having sustained an objection to his admissibility, on the ground of agency, the petitioner complained to the Court, who, after having allowed, before answer, an examination of Mr. Gibson in initialibus, from which it appeared that he had abstained from taking any charge of the cause; nevertheless, adhered to the commissioner's judgment.

Dec. 7, 1822.
SECOND DIVISION. M'K.

Petitioner's Authorities.—E. of March, Nov. 27, 1771, (16757); M'Latchy, March 22, 1773, (16776), Scott, Dec. 19, 1786, (16779); M'Alpine, Dec. 2, 1806. (Ap. Wit. No. 4.)
Respondents Authority.—Richardson, Nov. 30, 1815. (F. C).

GIBSON, CHRISTIE, & WARDLAW, W. S.—GEO. VEITCH, W. S.—Agents.

W. MOFFAT, Pursuer.—*Cuninghame—Borthwick.* No. 73.
JOHN M'KENZIE, Defender.—*Rollo.*

Bill of Exchange.—M'Lachlan indorsed and transmitted a bill for £100, drawn by him on M'Kenzie to Moffat, with instructions to obtain M'Kenzie's acceptance; to get the bill discounted; and, thereafter,

Dec. 10, 1822.
SECOND DIVISION. Lord Cringletie. M'K.

to remit one-half of the proceeds; and to pay to M'Kenzie the other half. M'Kenzie accepted the bill; and M'Lachlan becoming bankrupt, Moffat raised action against M'Kenzie for payment of the bill. In defence, he alleged,—1. That Moffat was not an onerous holder. 2. That he had not paid to him one-half of the proceeds, nor remitted the other half to M'Lachlan; and he referred these defences to his oath.—Moffat deponed, 1. That MacLachlan, at his bankruptcy, was owing him above £200; and, 2. That he had remitted to him £50, on discounting the bill, and had previously advanced £38 : 6s. to M'Kenzie. The Lord Ordinary found 'the oath negative of the defender's reference, to the 'extent of £38 : 6s.; and, to that extent, repelled 'the defences;' and the Court, on a petition by MacKenzie, adhered.

Pursuer's Authorities.—Chitty, 160, 526; Brown, against Watson Wighton & Co., Dec. 12, 1817, (Not rep.)

J. Greig, W. S.—H. J. Rollo, W. S.—Agents.

Davidson and Co., Appellants.—*Moncreiff—Hunter.*
Mackie, Respondent.—*Cranstoun—Lumsden.*

Dec. 10, 1822.

First Division.

Appeal to Circuit Court.—Stat. 20, Geo. II, c. 43.—Mackie raised action in the inferior court against Davidson and Co. for £30 of damages, and obtained decree for 1s., and for expences. Against this judgment, Davidson and Co. entered an appeal to the Circuit Court, which was objected to as incompetent, on the ground that the subject matter of the suit exceeded £25. To this it was answered, that the competency was to be judged of by the amount of the sum at issue between the parties in the appeal, which was only 1s., and the expences of process. The case having been certified, the Court, after a hearing at the bar, dismissed the appeal as incompetent. No papers.

D. MILLER, (J. DUNCAN's Trustee), Pursuer.—*Hope.*
D. Low, (Cashier of Dundee Bank), Defenders.—*Cranstoun—Alison.*

No. 74.

Dec. 11, 1822.

FIRST DIVISION.
Lord Kinedder.

H.

Bankrupt—Reduction on 1696, c. 5.—In June 1820, J. Duncan drew, on certain persons, two bills, each for £300, which he indorsed to the Dundee Bank. These bills were refused to be accepted, and Duncan, in place of them, and before the terms of payment, drew a bill on one of his sons for £615, (being the amount of the debt, including interest), who accepted it, after having previously received from his father an heritable bond in security, on which he was infeft. This bill was indorsed to the Bank, and, within sixty days thereafter, Duncan's estate was sequestrated. Miller, the trustee, raised an action of reduction of the indorsation on the act 1696, c. 5, against which the Bank maintained,—1. That as the son had accepted the bill for the accommodation of his father, the trustee had no interest to reduce the indorsation, because he could recover nothing in virtue of the acceptance; and, 2. That the bill being merely a renewal of the two prior bills, which were a legal charge against the estate, it was not reducible. The Lord Ordinary found, that the bill under reduction had been accepted by Duncan's son, 'who had previously obtained from his father, 'an heritable bond and disposition in security for the 'sum of £600; and that this bill, payable at a dis-'tant date, was delivered to the Dundee Banking 'Company, in lieu of the two bills above mentioned, 'of which the terms of payment had not then arriv-'ed; and that this bill was a deed in favour of the

'said company, for their farther security in prefer-
'ence to the other creditors of the said James Dun-
'can;' and, therefore, reduced it. To this interlocutor the Court adhered, reserving the effect of the original bills.

Pursuer's Authorities.—2. Bell, 220, 222, 228, 229, 230, and cases there referred to.
Defenders Authorities.—Sir W. Forbes, Feb. 19, 1790, (1181); Cowan, Jan. 7, 1762, (1167); 1. Bell, 228.

D. M'Lean, W. S.—Tennant & Lyon, W. S.—Agents.

No. 75. C. Gordon and Others, (Adjudging Creditors of Shand).—*Jameson.*
J. Rae and Others, Hunter's Trustees.—*Buchanan.*
Competing.

Dec. 11, 1822.
First Division.
Lord Gillies.
D.

Competition—Prior in tempore, &c.—Shand held certain burgage subjects on a personal right, with an assignation to an unexecuted procuratory of resignation. In 1813, he granted to Hunter an heritable bond and disposition in security over them, containing a power of redemption; an obligation to infeft by resignation; and the usual clause, binding himself to make the title-deeds forthcoming on all requisite occasions. Infeftment was immediately taken on this deed by Hunter, and the instrument recorded; and, thereafter, he conveyed his right to trustees, who were also duly infeft. The right of Shand, however, remained still personal. In January 1818, an adjudication was led against these subjects by Gordon, a creditor of Shand, on which horning was executed against the superior in May. Se-

veral others were deduced within year and day; but no infeftment passed either on them or on that of Gordon. A process of ranking and sale having been brought, and the title-deeds having been sealed up, a competition arose for possession of them, (which, in effect, resolved into a question of preference over the property), between Hunter's trustees and the adjudging creditors. By the creditors it was maintained,—1. That as Shand's right had never been feudalized, the infeftment of Hunter and his trustees was inept, and their right was thus merely personal; that Shand held the radical right in the titles, while that of the trustees was only an incumbrance; and that, as they had adjudged that radical right, they were entitled to be preferred: 2. That at all events, as a litigiosity had been created by the adjudication and ranking and sale, they must be preferred pari passu. Hunter's trustees, on the other hand, contended,—1. That their right, being anterior in date to that of the creditors, must prevail on the maxim, prior in tempore, potior in jure; and, 2. That the bond and disposition was a burden on Shand's personal right; that every subsequent adjudger of that right took it under that burden; and that, as the rights of the creditors were personal, they were affected by it. The Lord Ordinary 'having heard parties procurators upon the 'competition between the trustees of the heritable 'bond creditor and the adjudging creditors, and the 'demand made on the part of said trustees, to have 'the seal taken off the package of title-deeds in the 'clerk's hands, in order that they may borrow the 'same, finds, that the heritable bond being prior in 'date to the adjudications, the said trustees are pre-

'ferable, and entitled to have access to the title-deeds 'in the clerk's hands as craved by them.' And the Court adhered.

Creditors Authorities.—(1.)—Creditors of Gratney, Feb. 1728, (1127);—(2.)—2. Ersk. 11, 7; 2. Ersk. 12, 16; 1672, c. 19; 54. Geo. III, c. 137, § 10.
rustees Authorities.—(1.)—Bell, June 21, 1737, (2853); 1. Bell, 24; Wright, June 29, 1821, (Ante Vol. I, No. 116);—(2.)—2. Ersk. 3, 48; 1. Bell, 221; Preston, Mar. 6, 1805, (No. 2, Ap. Pers. & Real); Neilson, Dec. 22, 1738, (7773); Paterson, Dec. 10, 1742, (7775.)

H. J. DICKSON, W. S.—G. WATSON, W. S.—Agents.

No. 76.

JOHN DICK, Advocator.—*Christison.*
ALEX. FLEMING, Respondent.—*More.*

Dec. 11, 1822.

SECOND DIVISION. Lord Pitmilly. B.

Expences.—Dick pursued Fleming before the Sheriff of Lanarkshire, for damage alleged to have been sustained in consequence of Fleming not having sown down, with clover, in terms of agreement, a field set to him by Dick. The Sheriff, on considering a proof, assoilzied Fleming with expences. Dick advocated, and the Lord Ordinary 'dismissed the 'advocation,' but found no expences due, 'in respect 'of the defender having failed to roll the ground, 'and allowed his cows to pasture on it occasionally.' Both parties petitioned. The Court adhered, in so far as the advocation was dismissed; but, in respect that Dick had failed to establish his claim of damages, found him liable in expences.

W. RENNY, W. S.—ANDW. PATERSON, W. S.—Agents.

JAMES DODDS, Pursuer.—*Cranstoun—Sandford.* No. 77.
F. WALKER, Defender.—*Jeffrey—Jameson.*

Dec. 11, 1822.

SECOND DIVISION.
Lord Pitmilly.
B.

Proof.—A Farm was advertised by Lord Wemyss, to be let, and the advertisement stated, that offers would be 'received' by his Lordship's agents in Edinburgh, and by the defender, Walker. Dodds gave in a written offer to Walker, who thereafter wrote him in these terms.—'I have to inform you, that 'you are preferred to the farm of West Bearsford and 'Monkrigg, and, in order to arrange matters, I wish 'you to come here as soon as convenient.' A meeting accordingly took place, when a minute, or memorandum was drawn out, containing the subordinate stipulations of the intended lease, and was signed by both parties, according to Dodds's allegation, but, according to Walker's account, by Dodds alone. This writing was afterwards destroyed by Walker. Lord Wemyss, who was then in London, ultimately refused Dodds for a tenant, whereupon the present action was raised against Lord Wemyss, to implement the acceptance by Walker of the offer, and, failing that, against Walker for damages. The Lord Ordinary at once assoilzied Lord Wemyss, on the ground that he had given no authority to Walker to conclude a bargain for him; and allowed Walker a proof of his allegations, that Dodds had, all along, understood that he had no authority to conclude a bargain, and that it was only in the event of Lord Wemyss approving, that his acceptance was to be binding. Dodds reclaimed, on the plea, that written documents could not be modified by parole proof. The Court held, that allowing a proof of Walker's

allegations, in this case, did not at all infringe on that general rule, and, therefore, adhered.

T. BAILLIE, W. S.—WALKER, RICHARDSON, & MELVILLE, W. S.—Agents.

No. 78. J. M'FARLANE and Others, Suspenders.—*J. W. Dickson.*
J. RUSSELL, Trustee for Creditors of Falkirk Bank, Charger.—*Baird.*

Dec. 12, 1822.
FIRST DIVISION.
Lord Meadowbank.
H.

Count and Reckoning.—Russell charged M'Farlane and others for payment of a composition on a debt of £1,330. They suspended, on the ground that, on an examination of accounts, it would be found, that only a very small sum was due. The Lord Ordinary remitted to an accountant to examine and report. This was opposed by Russell, who alleged, that there was sufficient evidence in process of the existence of the debt; but the Court adhered.

J. GRAHAM, W. S.—D. & A. THOMSON, W. S.—Agents.

No. 79. M'KENZIE'S TRUSTEES, Suspenders.—*Moncreiff—Rutherfurd.*
JONES, FOX, and Co., Assignees of Gaffney, Chargers.—*More.*

Dec. 12, 1822.
SECOND DIVISION.
Lord Bannatyne.
F.

Principal and Agent.—In an action before the Sheriff of Lanarkshire, against Sharpe and M'Kenzie, (a mercantile house, of which the suspenders constituent was a partner), at the instance of Gaffney, their agent in Manchester, and his assignees, for payment

of the balance due Gaffney on his accounts with them, the Sheriff decerned against Sharpe and M'Kenzie for £1,041 : 17 : 4. Sharpe and M'Kenzie suspended, and a long litigation ensued, in the course of which different parts of the case were finally settled. That which now remained for decision related to a sale of cotton by Gaffney, as agent for Sharpe and M'Kenzie, to Park and Brothers, who agreed to pay him in 'bankers bills' at different dates. He took in payment the drafts of Park and Brothers, not accepted by their bankers, which were dishonoured, Park and Brothers having become bankrupt before these bills fell due. After an unsuccessful attempt to make Gaffney responsible as a del credere agent, he was required to produce the bills alleged to have been received by him from Park and Brothers; and it was alleged, that, at the time of the sale, Park and Brothers were notoriously insolvent, and that Gaffney had been guilty of gross negligence, in not demanding bills drawn by bankers, which, it was said, was the meaning of the phrase 'bankers bills.' As Gaffney could not produce the bills, the chargers offered security against their re-appearance, and to obtain the suspenders to be ranked for the price of the cotton on the estate of Park and Brothers, without production of the bills. It was denied that Park and Brothers were insolvent at the time of the sale; and it appeared, that Gaffney had sold to them a large quantity of cotton on his own account at the same time, and had accepted the same description of bills in payment, which he considered perfectly good. With regard to the phrase 'bankers bills,' it was said to mean bills drawn on bankers, and not acceptances

nor drafts of bankers. The Lord Ordinary suspended the letters; but the Court held, that Gaffney had not been guilty of any undue negligence, and had acted for Sharpe and M'Kenzie as he had done for himself; that it was proved, 'that the suspenders are 'entitled, without production of the bills, to draw a 'dividend from the bankrupt estate of Park and 'Brothers, effeiring to the sum of £1,610; and, fur-'ther, in respect that no loss or damage can be shewn 'to have resulted to the suspenders from the loss or 'non-production of the aforesaid bills or drafts, and 'that unexceptionable security has been offered a-'gainst their re-appearance,' they found the letters orderly proceeded, to the extent of a balance arising after making certain deductions, which had been previously established against Gaffney.

R. Hill, W. S.—A. Pearson, W. S.—Agents.

No. 80. Earl of Strathmore, Pursuer.—*Clerk*—*Cuninghame*—*Hope.*

Trustees of the late Earl of Strathmore, Defenders.—*Cranstoun*—*Thomson*—*Fullerton*—*Moncreiff.*

Dec. 13, 1822.

First Division. D.

Aliment.—John, ninth Earl of Strathmore, died in 1776, leaving four children, the eldest of whom, John, the tenth Earl, (the constituent of the defenders), succeeded to the titles and estates. A provision of £12,500 was left, payable at majority, to the pursuer, who was the third son. Of this he, on arriving at that period, received payment from his eldest brother, for which he granted a receipt, and also for 'such sums as were 'necessary for my maintenance and education, from 'the death of my said father until I attained the

'age of majority, or twenty-one years complete.' Thereafter, by the death of his immediate elder brother, he acquired a large estate in England. In 1815, John, the tenth Earl, having no lawful issue, executed a trust-disposition and deed of entail of all his property, by which he conveyed it to the defenders; excluded all who had any right as heirs for thirty years, and the pursuer for ever from the succession; and appointed the trustees to accumulate all the savings of the estates into a fund, for the benefit of the person who should have right after the above period had expired. On the death of his brother, the pursuer became Earl of Strathmore. Being cut out of the estates by the effect of the above deeds, he brought an action of aliment against the trustees, stating, that he was now reduced to utter indigence, and concluding, 'that by the law of nature, as well as by the 'laws and practice of Scotland, he, as representing 'the said noble family, and inheriting the titles, ho-'nours, and dignities descending along with the said 'estates through a long line of ancestors, and for 'the suitable support whereof the same were origin-'ally granted, is entitled in the meantime to be ali-'mented out of the proceeds and profits of the said 'estates vested in trust as aforesaid, in a manner 'suitable to his rank and station.' Against this action, the trustees pleaded in defence, that although an obligation to aliment, ex jure naturæ, exists between parent and child, yet, no such claim lay against a brother,—that the obligation of the father had been implemented by an ample provision to the pursuer, and could not, therefore, descend against his heir, jure representationis,—that the heir had been discharged of all claim of this kind,—and that

the pursuer was now past majority. The Court, after a hearing in presence, and on advising memorials, and afterwards a petition and answers, sustained the defences.

Several of their Lordships were of opinion that the obligation, as between parent and child, was perpetual,—and all were agreed, that where the parent had at his death provided for his child, no claim can arise against his representative by the subsequent poverty of the child.

Pursuer's Authorities.—Balfour, 95; 2. Ersk. 9, 62; 2. Cr. 17, 20; 1. St. 5, 7–12; 1. Ersk. 6, 56–58; M'Culloch, Nov. 28, 1752, (No. 48, Ech. Tailzie); 1. Ersk. 1, 8–20; 4. Puffend. 11, 4; 25. Dig. tit. 3, De Agn. lib; 1. Bankt. 6, 16; 1. Ersk. 6, 28.

Defenders Authorities.—Hastie, Nov. 10, 1671, (416); Somerville, Feb. 2, 1711, (422); Douglas, Feb. 8, 1739, (425); Logan, Dec. 18, 1758, (428); 1. Ersk. 4, 58; 1. St. 5, 10; 4. Bankt. 48, 17; Malcolm, Jan. 16, 1756, (439); Clerk, Feb. 19, 1799, (Ap. No. 2, Aliment); 1. Fount. 43, 298, 501; 2. Fount. 287, 284; Bonnar, June 15, 1709, (6285); Buchan, Feb. 23, 1666, (411.)

J. HAMILTON, W. S.—R. J. DUNDAS, W. S.—Agents.

No. 81. EARL of STRATHMORE, Petitioner.—*Clerk—Cuninghame—Hope.*

TRUSTEES of the late EARL of STRATHMORE, Respondents.—*Cranstoun—Thomson—Fullerton—Moncreiff.*

Dec. 13, 1822.

FIRST DIVISION.

D.

Aliment—Expences.—During the dependence of the preceding case, the petitioner applied for a warrant on the respondents to pay to him, out of the trust-funds, a sum of money, to defray his law-expences, on the ground that the Court were entitled to do so in every case where a question existed relative to the rights of parties in a common fund. To

this it was answered, that the petitioner was not only excluded from the fund, but that he had raised an action of reduction of the deeds by which it was created; and, therefore, he had no common interest in it. The Court refused the petition.

Petitioner's Authorities.—Hardman against Guthrie, Feb. 22, 1820, (Not rep.); Gray against Moffat, Dec. 8, 1813, (Not rep.); Mad. Sasson against Sir J. Campbell, Jan. 20, 1819, (F. C.); 2. Haggard's Rep. 395.

J. Hamilton, W. S.—R. J. Dundas, W. S.—Agents.

J. Forbes and Others, Pursuers.—*Jeffrey—Hunter.* Milne, Philip, and Company, Defenders.—*Skene—Rutherfurd.*

No. 82.

Dec. 13, 1822.

First Division. Lord Gillies. D.

Fraud—Power of Shipshusband.—Forbes and others, owners of the brigantine Traveller of Aberdeen, raised an action against Milne, Philip, and Company, for restitution, or payment of the value, of a quantity of staves, of which they had taken possession. The defence was, that they had purchased them from a person delegated by the shipshusband to act in his absence; or that, at all events, they had received them as a consignment, and that they had advanced to the shipshusband more than their value. The Lord Ordinary repelled the defences; and the Court, considering that the whole circumstances shewed this to have been a fraudulent transaction, adhered.

It was agreed on the Bench, that the shipshusband had no right to delegate his powers, and, more especially, in this case, where the owners were on the spot, and had immediately objected to the transfer of the staves.

Defenders Authorities.—1. Bell, 410; 3. Erak. 3, 33; Abbot, 63; 1. Bell, 311; 3. Dow, 218; 1. Bell, 212.

A. Youngson, W. S.—J. Morrison, W. S.—Agents.

No. 83. R. PEDDIE, Petitioner.—*Cranstoun.*

Dec. 13, 1822.
SECOND DIVISION.
F.

Judicial Factor.—Peddie, judicial factor, appointed by the Court, on the estates of Colonel Bannerman, deceased, pending a process of ranking and sale, applied to the Court to be allowed to make certain deductions from rents to the several tenants, according to rates approved of at a meeting of the creditors. The Court, after having appointed the petition to be intimated, in respect of the concurrence of the heir and of the creditors, authorized the factor to charge himself, for the current year, with the rents, under the deductions approved of by the creditors; but refused to interpose the authority of the Court, to a permanent reduction of those rents, to which the tenants were bound by their leases.

DAVID WATSON,—Agent.

No. 84. J. RUSSELL, Trustee of the Falkirk Bank, Pursuer.—*Baird.*
J. M'NAB, Defender.—*Forsyth.*

Dec. 14, 1822.
FIRST DIVISION.
Lord Meadowbank.
H.

Bill of Exchange—Viliation——Process.——Russell raised action against M'Nab, on a bill apparently dated 1st August 1814, against which, compensation, to a certain extent, was pleaded in defence. Decree, in terms of the libel, was, at first, pronounced, in respect the documents were not produced to instruct compensation. In representing against that decree, M'Nab objected, that the date of the bill had been altered from 1811 to 1814; and the Lord Ordinary, 'in respect that the bill on which the present action

' is founded, is vitiated, and a null document,' assoilzied M'Nab, with expences from the time of pleading vitiation, and refused, as irrelevant, a reference to his oath of the existence of the debt, reserving a new action for the debt. Against this interlocutor, so far as it found M'Nab entitled to expences, Russell reclaimed; but the Court adhered.

Defender's Authorities.—Bryce, Nov. 26, 1810, (F. C.); Callender, Dec. 10, 1810, (F. C.); Chitty, 118.

D. & A. Thomson, W. S.—Gibb & Peddie, W. S.—Agents.

W. Cundell and Others, Trustees of G. Nielson. —*Gillies.*
Mrs. Peacock and Husband.—*M'Farlane.*

No. 85.

Dec. 14, 1822.

First Division. Lord Meadowbank.

Trustee—Expences.—Neilson appointed Cundell and others trustees, under a deed of settlement, to manage his property, and distribute it after his death among his children. He gave them full power to retain the share of any child to whom they might think it improper to entrust it, either on account of extravagance, dissipation, weakness, losses in trade, or other unforseen circumstances. One of his daughters married Peacock, who became insolvent, was under trust, and whom his own agent had suggested ought to be interdicted. The trustees, doubting how far they were in safety to pay his wife's share to him, asked the judgment of the Lord Ordinary, who found they were bound to do so, in respect, ' there is no specific averment from which it can ' reasonably be inferred that the affairs of Mr. Pea- ' cock have, ' by extravagance, dissipation, weak- " ness, losses in trade, or other unforseen accidents,"

'fallen into disorder,'—and that the trustees were liable, personally, in expences. But the Court altered, and found that they were not liable personally.

Trustee's Authority—Taylor, S. Maddock, 176.

D. S. Threshie, W. S.—Tod & Wright, W. S.—Agents.

No. 86. D. M'Kenzie, Pursuer.—*Moncreiff—Forbes—Murray.*
Hon. Mrs. S. M'Kenzie, Defender.—*Cranstoun—Matheson.*

Dec. 14, 1822.
Second Division.
Lord Cringletie.
F.

Non-Entry.—Francis, late Lord Seaforth, in order to separate the superiority from the dominium utile of certain lands, feued them to Mr. C. M'Kenzie, W. S.; and, thereafter, executed a disposition of the same lands, under burden of this feu-right, to Sir Samuel Hood, who obtained a crown-charter, and who, without taking infeftment, reconveyed the dominium directum thus constituted to Lord Seaforth, assigning to him his crown-charter and precept. Lord Seaforth then granted a disposition to the pursuer, of 'the superiority of all and whole the lands,' &c.; and assigned to him the crown-charter and precept of Sir Samuel Hood; and on this the pursuer was infeft. Mr. C. M'Kenzie having reconveyed the dominium utile, Lord Seaforth entailed the lands, calling his eldest daughter, the defender, to the exclusion of her sisters. On Lord Seaforth's death, the pursuer raised the present action of declarator of non-entry. Mrs. Stewart M'Kenzie pleaded in defence,—1. That the pursuer's title to the superiority was inept, the conveyance to him being merely of the 'superiority,'

and not of the 'lands' under burden of the vassal's rights. 2. That supposing it to be a valid conveyance, the right conveyed was limited by its very terms; and although it might confer a title to vote for a member of Parliament, it did not constitute a dominium plenum, and could not support a declarator of non-entry. It was answered, 1. That a conveyance of the 'superiority' created a perfectly valid title; and that, at any rate, the pursuer was infeft on Sir Samuel Hood's charter and precept assigned to him, in which the warrant was for infefting 'in the lands' themselves. 2. That a conveyance of the 'superiority' must carry every right consequent to the possession of the dominium directum, otherwise two crown vassals might exist in the same lands.

The Lord Ordinary decerned in the declarator, and the Court adhered.

Observed on the Bench, that the essential difference between this case and that of Park was, that, in the latter, the precept was for infefting, not in the 'lands,' but in the 'superiority and feu-duties; and the seisin itself was so given.

Pursuer's Authorities.—2. Stair, iii, 7; iv, 13–14; 2. Erak. v, 1–4; Laird of Lagg, Nov. 19, 1624, (13787.)

Defender's Authorities.—Baron Norton, July 6, 1813 (F. C.); Park, &c. May 16, 1816, (F. C.)

W. M'Kenzie, W. S.—R. Ayton, W. S.—Agents.

R. M'Arthur, Advocator.—*P. Robertson.*
P. Forbes and Co., and Others, Respondents.—*Marshall.*

No. 87.

Dec. 14, 1822.

Second Division. Bill-Chamber. Lord Bannatyne. F.

Landlord and Tenant—Implied Assignation of Hypothec.—M'Callum's furniture having been sequestrated by his landlord for payment of rent, and

warrant of sale obtained, M'Arthur consigned the amount, which was uplifted by the landlord. P. Forbes and Co., and other creditors of M'Callum, executed poindings of the effects which had been sequestrated, and obtained warrant of sale. M'Arthur applied for an interdict to the Sheriff, who dismissed the application. A bill of advocation of the Sheriff's judgment having been refused by the Lord Ordinary, M'Arthur petitioned, and pleaded, That the landlord having uplifted the rents consigned by him in a process of sequestration, must be held to have virtually assigned to him his right of hypothec and diligence. The Court passed the bill.

FALCONER & JOHNSTON—A. MANNERS, W. S.—Agents.

No. 88.

ANGUS M'MILLAN, Suspender.—*Gillies.*
J. BAIN, Charger.—*Jameson.*

Dec. 14, 1822.

SECOND DIVISION. Bill-Chamber. Lord Robertson. M'K.

Process.—M'Millan being charged by Bain to pay a bill of exchange, presented a bill of suspension, on the ground, that his name, which appeared on the bill as that of indorser, was a forgery. Answers were ordered, which, after some interval, Bain gave in, merely stating, that having, in the meantime, received payment from a previous indorser, he passed from the charge. Thereon, the Lord Ordinary refused the bill with expences. With the view of obtaining his expences, M'Millan petitioned, alleging that he had intimated to Bain or his agents, that his name was forged, previous to the charge having been given. The Court passed the bill.

J. THORBURN—C. FISHER,—Agents.

J. INNES, Suspender.—*Forsyth—Jameson.*
R. B. ALLARDYCE and others, Chargers.—*Jeffrey—Gillies.*

No. 89.

Dec. 14, 1822.

SECOND DIVISION.
Bill-Chamber.
Lord Craigie.
M'K.

Title to pursue—Interdict.—Innes possessed the estate of Durris, under a tack, which gave him full right to the game on the lands. His lease had been reduced by judgment of the House of Lords affirming the decision of the Court in an action at the instance of the landlord, but no decree of removal had been pronounced. He presented a bill of suspension and interdict against Allardyce and other neighbouring proprietors, to have them interdicted from shooting on certain parts of the estate of Durris. The Lord Ordinary passed the bill, but refused the interdict. Innes petitioned against the interlocutor, in so far as it refused the interdict. The chargers pleaded,—1. That Innes's lease being reduced, he had no title to pursue; 2. That they had a right of commonty in the special portions of the lands, against shooting, on which the interdict was craved, and that these portions were not specified by name in Innes's lease. The Court, while they held Innes's title perfectly good till decree of removal, adhered to the interlocutor.

THOS. INNES, W. S.—W. DUTHIE, W. S.—Agents.

J. GIBSON, Pursuer.—*J. Henderson, Junior.*
H. GORDON, Defender.—*Gordon—Lumsden.*

No. 90.

Dec. 17, 1822.

FIRST DIVISION.
Lord Alloway.
H.

Process—Mandatory.—Decree of absolvitor, in respect the pursuer, who was resident abroad, had failed to appear, and his mandatory had withdrawn appear-

ance; and afterwards adhered to, in respect of no mandatory being sisted.

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. LYON,—Agents.

No. 91.

J. MOODIE, Advocator.—*Robertson.*
T. ~~GIBSON~~ Gordon, and Others, Respondents.—*Gillies.*

Dec. 17, 1822.

FIRST DIVISION.
Lord Alloway.
S.

Soldier—Exclusive Privilege—Statutes—24. Geo. III, c. 6.—37. Geo. III, c. 103.—42. Geo. III, c. 69.—Moodie enlisted as a substitute into the Ninth, (or Royal Perthshire), North British Militia, and served as a private for three years and six months, during part of which time, the regiment was twice in Ireland. It was disembodied on the 30th of April 1802, when he was discharged, at which time he was a married man. In virtue of his service, and of his marriage, he claimed the privilege of exercising the trade of a mason within the burgh of Perth. This was resisted by the wright incorporation, who presented a summary complaint against him to the Sheriff, praying for fine, damages, and interdict, on account of the violation of their privileges. The Sheriff granted the interdict, and found him liable in damages, on the ground that the statute applicable to his case was the 42. Geo. III, c. 69, which requires five years service. But the Lord Ordinary, in an advocation, altered that interlocutor, and assoilzied Moodie, 'in respect that, at the time the advocator served in the militia, the existing statutes 'were the 24. Geo. III, c. 6, which passed in the 'year 1784, which conferred upon all officers, mariners, soldiers, and marines, including the militia, 'who have been drawn by ballot, and have person-

'ally served in the militia, or any of the fencible re-
'giments, from the 1st April 1783, for the term
'of three years, and have been honorably discharged,
'the privilege of exercising such trades as they are
'apt or able for, in any town or place within the
'kingdom; and the 37. Geo. III, c. 103, by which
'it is enacted, that every such person having served
'in the militia, when called out into actual service,
'may set up, and exercise any trade in any town or
'place within the kingdom of Great Britain, without
'any molestation for or by reason of the using of
'such trade, in like manner as any person who has
'served in his Majesty's navy, or as a soldier in his
'regular land-forces may do; and in respect that it
'is not denied that any soldier or mariner, who had
'then been three years in the service, is entitled to
'this privilege; and in respect the advocator obtain-
'ed his discharge in the month of April 1802, and
'before the enactment of the 42. Geo. III, c. 69; and
'in respect of the decision of the Court in the case of
'Kirkwood against the Tailors of Canongate, (19th
'January 1811).' To this interlocutor the Court, on advising the opinions of the Attorney-General of England, and Mr. Harrison, counsel for the War-office, in favour of Moodie, adhered.*

C. M'Donald, W. S.—W. Bennet, W. S.—Agents.

* Mr. Harrison, in his opinion, stated, that lately 'a case has
'occurred in the House of Lords, from which, although the points
'in discussion are not the same, it is clear that the Courts will
'give the most enlarged and liberal construction to all such pri-
'vileges as are given by the Legislature as rewards for services,
'and more particularly those which are given to persons called
'upon to serve in the militia.'

No. 92. INCORPORATION of FLESHERS of KIRKALDY, Suspenders.—*More.*
MAGISTRATES of KIRKALDY, Chargers.—*Moncreiff—Cuninghame.*

Dec. 17, 1822.

SECOND DIVISION. Bill-Chamber. Lord Kinedder. B.

Burgh—Market-Place—Customs.—In 1718, the Magistrates of Kirkaldy purchased a piece of ground, on which they erected a market-place for the accommodation of the fleshers, who, prior to that period, had enjoyed the privilege of exposing their meat for sale on the public street, paying certain dues for each animal killed. They continued to possess the market-place, paying the same dues, till 1821, when the magistrates determined to levy a rent from the fleshers for the stalls they occupied, and, for that purpose, they advertised the market-place to be let by public roup. The fleshers presented a bill of suspension and interdict, which was refused by the Lord Ordinary, 'in respect that the fleshmarket belongs to the 'magistrates for the use and behoof of the commu-'nity.' The fleshers petitioned, and contended that the dues in use to be levied for each animal killed were of the nature of 'customs' paid for the accommodation afforded them, and that the magistrates could not, by demanding rent for the stalls, virtually raise these customs. The Court at first adhered, but, on a reclaiming petition, altered, and remitted to pass the bill and continue the interdict.

Suspenders Authority.—Magistrates of Edinburgh, Dec. 6, 1810, (F. C.)
Chargers Authority.—Magistrates of Edinburgh, Dec. 18, 1799, (Ap. Burgh Royal, No. 6.)

W. & A. G. ELLIS, W. S.—J. STUART, W. S.—Agents.

W. BERRY and Others, (Trustees of FRASER of Pitcalzean), Petitioners.—*Forsyth.*
J. & A. ANDERSON, Respondents.—*Greenshields—Moncreiff.*

No. 93.

Dec. 17, 1822.

SECOND DIVISION. Lord Robertson. M'K.

Sequestration of Land Estate.—Andersons purchased the estate of Fraser of Pitcalzean at a sale, in virtue of an heritable bond and disposition in security, and retained part of the price in extinction of a debt said to be due to them under a promissory-note, and decree in absence. They obtained possession, but got no feudal title. In a reduction of these deeds by Fraser's trustees, the Court decerned against Andersons, (see ante, Vol. I, No. 82.), who appealed to the House of Lords. A multiplepoinding having been brought, in which Andersons were ~~ordered, but failed~~ held not found to consign the fund *in medio;* and a commission of bankruptcy having been issued against them, Fraser's trustees applied to the Court to sequestrate the estate of Pitcalzean, and appoint a judicial factor. The Court remitted the petition to the Lord Ordinary in the multiplepoinding, who refused it, and the Court adhered.

The Court held, that a sequestration was a remedy, which should only be applied, when neither of the parties competing is in possession.

THOS. RICHARDSON, W. S.—GEO. DUNLOP, W. S.—Agents.

No. 94. J. FINDLAY and COMPANY, Suspenders.—*Clerk—Ivory.*
W. GILLIES, Charger.—*Moncreiff—Shaw.*

Dec. 17, 1822.

SECOND DIVISION. Bill-Chamber. Lord Kinedder. M'K.

Process—Jurisdiction—59. Geo. III, c. 66.—Gillies laid an information before the Justices of Peace of Stirlingshire, on the Act 59. Geo. III, c. 66, against Findlay and Company, for employing children under nine years of age in their cotton work. The Justices pronounced a judgment, wherein they find, 'that the defenders did employ James Hossack, a 'boy under nine years of age, at their work, and did 'thereby wilfully offend against the provisions of 'the Act founded on. They do, therefore, convict 'them of the offence, and find, that they have for-'feited the sum of £5 sterling, to which they miti-'gate the penalty of the Act.'

Findlay and Company tendered an appeal to the Quarter Sessions, which the Justices refused as incompetent; whereon they appealed against this refusal, which appeal was entered on record, and allowed to be answered by Gillies. Instead of prosecuting this appeal, Findlay and Company presented a bill of suspension, as on a threatened charge, chiefly on the ground, that the information did not charge them in terms of the Act, with having 'wilfully' employed a boy under nine years of age; and that the Justices' judgment did not find that they had employed him 'wilfully.' The Lord Ordinary having passed the bill, Gillies petitioned, and pleaded,—1. That the Court of Session had no jurisdiction, this being a question regarding a statutory crime or offence, and only cognizable by the Court of Justiciary. 2. That the judgment of the Justices was merely

an interlocutor, on which no execution could pass, as the statute required, that a warrant in a special form should be issued, and, as advocation was prohibited, a suspension was incompetent. 3. That the appeal to the Quarter Sessions not being disposed of, constituted a lis alibi pendens.

The Court, considering the questions of jurisdiction and competency, as involving too much difficulty and doubt to be tried in the Bill-Chamber, adhered to the Lord Ordinary's interlocutor, passing the bill.

Suspender's Authorities.—(1.)—Johnston, May 15, 1810, (F. C.)—(2.)—4. Ersk. iii, 5–7; Ogilvie, March 7, 1798, (7631.)
Charger's Authorities.—(1.)—Meek, June 5, 1812, (F. C.)—(2.)—2. Bank. p. 675; Stair, p. 797; 4. Ersk. ii, 40, and iii, 8.

GIBSON, CHRISTIE, & WARDLAW, W. S.—A. P. HENDERSON,—Agents.

JAMES SCOTT, Suspender.—*Cuninghame—Shaw.*
JOHN REID, Charger.—*Hutchison.*

No. 95.

Dec. 19, 1822.

SECOND DIVISION.
Bill-Chamber.
Lord Bannatyne.
M'K.

Process—A. S. 14th Jan. 1799.—Scott presented a bill of advocation, of a judgment of the magistrates of Glasgow, which was passed; but having neglected to expede the letters within ten days, as required by A. S. 14th Jan. 1799, Reid obtained a certificate, extracted the decree, and charged thereon. Scott then presented a bill of suspension, which the Lord Ordinary refused as incompetent, 'in respect, it does not appear to him compe-'tent for the complainer to renew, in the form of a 'suspension, the same objections to the judgments 'of the magistrates, on which he had formerly ap-'plied for, and obtained letters of advocation, the

'benefit of which has been lost, by neglecting to ex-'pede them within the time allowed by A. S. 1799.' The Court recalled this interlocutor, and remitted to advise on the merits.

Suspender's Authority.—4. Stair, 37, 11, Duke of Queensberry, July 7, 1810, (F. C.)
Charger's Authority.—Lord Forbes, Feb. 26, 1819, (F. C.)

A. P. HENDERSON—A. CONNELL, W. S.—Agents.

No. 96.

JAMES GRANGER, Advocator.—*Sandford.*
DUKE of HAMILTON, and his FACTOR, Respondents.—*Jardine.*

Dec. 19, 1822.

SECOND DIVISION. Bill-Chamber. Lord Kinedder B.

Reparation.—Granger raised action of damages before the Sheriff of Lanark, against the Duke of Hamilton, (whose tenant he was), and Brown his factor, for alleged nimious and oppressive conduct in executing several successive actions, sequestrations, and poindings of his crop for arrears of rent, while his Grace owed money to the pursuer, to an equal or larger amount than the rents due. The Sheriff found, that Granger's claims of compensation were not liquid, nor had any allusion been made to them, till subsequent to the proceedings at the instance of the Duke; and that, even although these claims had been liquid, he was largely in arrear at the period of each of the successive proceedings, and he assoilzied the defenders. Granger presented a bill of advocation, which the Lord Ordinary refused, for the reasons stated in the Sheriff's interlocutor, and the Court adhered.

D. FISHER—R. RUTHERFORD, W .S.—Agents.

G. JEFFREY, Suspender.—*M'Neill.*
A. CAMPBELL, Charger.—*Sir J. Connell.*

No. 97.

Stat. 55. Geo. III, c. .—Expences.—Campbell, as collector of the assessment for building a jail in the county of Renfrew, under the act *55.* Geo. III, c. , which declares, that the assessment 'shall be 'leviable from the occupiers for the time being,' poinded the crop of Jeffrey, tenant in the lands of Prospect-Hill, for the assessment which had become payable for these lands previous to his possession. In a suspension at Jeffrey's instance, on the ground, that the assessment was not debitum fundi, the Lord Ordinary suspended the letters, but found no expences due. On advising counter reclaiming petitions, the Court adhered as to the merits, but recalled as to expences, in which they found Campbell liable to Jeffrey.

Dec. 19, 1822.
SECOND DIVISION.
Lord Pitmilly.
F.

JOHN BLAIR, W. S.—JOHN MALCOLM,—Agents.

Mrs. B. MUNRO, Petitioner.—*Jeffrey—Matheson.*
D. CRAWFORD, Respondent.—*Skene—Robertson.*

No. 98.

Witness—Reprobator.—In the course of a proof by commission, Crawford adduced Purse as a witness, who, having been purged of malice, &c. and examined for him, was cross-examined for Monro, both on his credibility and on the merits. After the examination was finished, Monro protested for reprobators; but, thereafter, she cited Purse as a witness for herself. The commissioner refused to allow a

Dec. 19, 1822.
SECOND DIVISION.
F.

reprobatory proof. Monro then applied to the Court, who adhered.

Petitioner's Authority.—Lord Lovat, State Trials, vol. 9, p. 646.
Respondent's Authorities.—4. Ersk. ii, 29; Irvine, Nov. 22, 1751, (16762.)

T. M'KENZIE, W. S.—H. M'QUEEN, W. S.—Agents.

No. 99.

H. CALLUM, Pursuer.—*Cuninghame.*
C. FERRIER, (Trustee of Scotch Patent Cooperage Company), and Others, Defenders.—*Forsyth.*

Dec. 20, 1822.

FIRST DIVISION.
Lord Meadowbank.
S.

Lien—Retention.—The Scotch Patent Cooperage Company purchased the growing woods of Fairburn in Ross-shire, and employed Callum, in June 1815, 'to cut bark, drag, and float' it to Dingwall. He, accordingly, with the assistance of people hired by himself, and under the superintendence of a manager of the Company, performed a considerable part of the contract. In February 1816, Callum and the workmen were obliged to cease working on account of the Company having failed to pay arrears due to them. The wood was left lying on the ground where it had been cut, to which Callum had no right of possession. The Company was sequestrated in March thereafter, and a question then arose between Callum and the trustee as to a right of lien over the wood. Callum alleged, that, from the nature of the contract by which he was to manufacture and prepare the wood, he was entitled to be preferred for the wages due to himself and the people employed by him;—that he held the only possession of which the subject was capable; and that he never voluntarily parted with it. The trustee, on the other hand, maintained,

1. That Callum never had possession, as the work was performed under the superintendence of the manager of the Company; and, 2. That, at all events, he had lost actual possession prior to the sequestration. The Lord Ordinary, in an action raised by Callum, assoilzied the trustee, and the Court adhered.

Two of their Lordships expressed an opinion, that Callum never had that possession essential to a right of retention; and, with one exception, their Lordships were agreed, that, at all events, possession had been lost.

Pursuer's Authorities.—2. Bell, 32; 1. Bell, 101.
Defenders Authorities.—(1.)—2. Bell, 164, and cases there.—(2.)—2. Bell, 97 and 101.

Æ. M'Bean, W. S.—Forsyth & M'Dougall,—Agents.

A. Cameron, Advocator.—*Robertson.*
A. R. Macdonnel, Respondent.—*Moncreiff—Jameson.*

No. 100.

Dec. 20, 1822.

First Division.
Bill-Chamber.
Lord Mackenzie.
D.

Interdict.—Macdonnel having obtained decree of removing from a farm against Cameron, an advocation was brought by the latter; and, during its dependence, he applied to the inferior court for an interdict againt Macdonnel, who, he alleged, had attempted, via facti, to eject him. This being refused, Cameron presented a bill of advocation, which the Lord Ordinary passed, ob contingentiam of the other; but refused an interim-interdict. The Court, however, remitted to him to grant the interdict.

D. Macintosh, W. S.—J. Macdonnel, W. S.—Agents.

No. 101. W. Brown and Others, Petitioners.—*Greenshields.*
W. Jeffrey and Others, Respondents.—*Forsyth.*

Dec. 20, 1822.

Second Division. B.

Process—Execution Pending Appeal—St. 48. Geo. III, c. 151.—Jeffrey and others having appealed against certain judgments of the Court, in a question with Brown and others, (ante, Vol. I, No. 129), before a part of the expences found due had been modified and decerned for, Brown, &c. applied for interim-execution pending appeal. The Court, (who were then doubtful of their power to give execution for expences not modified at the time of appeal,) granted it for those expences only which had been modified. Brown, &c. presented a second petition for an additional warrant to obtain payment of the expences not modified. The Court refused this petition as incompetent, the prayer being 'to *remit to the Lord Ordinary* on the Bills to allow the auditor to tax the expences before mentioned, and to decern.' Brown, &c. reclaimed, and varied their prayer, craving '*their Lordships* to allow the auditor to tax,' &c. But the Court held, that although they were now satisfied that they might, on the original application, have granted execution for these expences, yet as the act 48. Geo. III, c. 151, only provides for one petition for execution pending appeal, they could not entertain a second, for further execution; and they, accordingly, refused the petition.

Jas. Gemmel—A. Kidd,—Agents.

Mrs. M. KIPPEN and Others, (Representatives of the late J. HILL), Suspenders.—*Alison.*
R. HILL, (Assignee of W. MITCHELL), Charger.—*Moncreiff—Maidment.*

No. 102.

Dec. 20, 1822.

SECOND DIVISION.
Bill-Chamber.
Lord Robertson.
F.

Constitution of Debt against Representatives.—This was a charge against the representatives of the deceased James Hill, proceeding on a registered bond, in which he had been obligant. The representatives presented a bill of suspension, on the ground, that the debt had not been constituted, or transferred against them. The Lord Ordinary refused the bill; but the Court recalled his interlocutor, and passed it without caution.

Suspenders Authorities.—1. Bell, 183; 3. Ersk. ix, 35; Nisbet, June 16, 1715, (16158.)
Charger's Authorities.—Act 1696, c. 39; 2. Ersk. v, 54; 1. Bell, 286; Herbertson, June 12, 1793, (8157.)

TENNENT & LYON, W. S.—J. J. FRASER, W. S.—Agents.

T. & W. JAMIESON and Others, Petitioners.—*Jamieson.*

No. 103.

Dec. 21, 1822.

FIRST DIVISION.
S.

Bankrupt—Recal of Sequestration.—The estates of Jamiesons were, on their own application, sequestrated under the bankrupt act, and a trustee was elected. Thereafter, they, with the concurrence of the trustee, and of all the creditors who had ranked, presented a petition to have the sequestration recalled, as, in the circumstances, injurious and inexpedient. The Court, after intimation on the wall, and in the Gazette, and no objection being stated, granted the prayer.

Petitioners Authority.—2. Bell, 370.

C. FISHER,—Agent.

No. 104. Mrs. Ch. Small, Petitioner.—*J. Henderson, Junior.*

Dec. 21, 1822.
Second Division.

Factor Loco Tutoris.—The Court refused to appoint *two* persons as joint factors loco tutoris,—but the prayer of the petition having been restricted to one, he was appointed.

Pearson & Sandilands, W. S.—Agents.

No. 105. Earl of Stair, Petitioner.—*Clerk—Cranstoun—Gibson.*
J. Vans Agnew, Respondent.—*Jeffrey—Robertson.*

Dec. 21, 1822.
Second Division.
B.

Inhibition.—Agnew obtained a judgment of the House of Lords in an action at his instance against the Earl of Stair and others, purchasers of parts of the estate of Barnbarroch, reducing the sales, and finding the purchasers liable to him, as the heir of entail, for the rents accruing since his succession to the property. On the Court delaying to apply the judgment till after the meeting of parliament, to enable the purchasers to petition the House of Lords to be reheard, (see No. 63). Agnew raised inhibitions against Lord Stair and the other purchasers. Lord Stair applied to the Court to have them recalled, on caution. The Court granted the prayer; recalled the inhibition, on caution being found for the rents; and, considering the inhibition, under all the circumstances of the case, to have been unnecessary and vexatious, found Agnew liable in expences.

Gibson, Christie, & Wardlaw, W. S.—J. S. Robertson, W. S.—Agents.

EARL of STAIR, Petitioner.—*Clerk*—*Cranstoun*—*Gibson.* No. 106.
J. VANS AGNEW, Respondent.—*Jeffrey*—*Robertson.*

Loosing Arrestment.—The Lord Ordinary reported a bill presented without caution, for loosing arrestments used against Lord Stair by Agnew, for the same claims as the inhibition in the last case. The Court passed the bill, without caution, in respect of the caution found in the inhibition for the same claims.

Dec. 21, 1822.
SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. S. ROBERTSON, W. S. —Agents.

J. HAY, Suspender. No. 107.
PERTH BAKING COMPANY, Chargers.

Process.—The Court refused to write on a petition signed by Hay, but not by Counsel.

Jan. 14, 1823.
FIRST DIVISION.
Lord Meadowbank.
H.

EARL of WEMYSS, Pursuer.—*Thomson*—*Jeffrey*—*Keay.* No. 108.
DUKE of QUEENSBERRY'S EXECUTORS—*Clerk*—*Irving*—*Cranstoun*—*Murray*—*Cockburn*,—and W. MURRAY, Defenders.—*Moncreiff*—*Cuninghame.*

Bona et Mala Fides—*Tailzie.*—In 1809, the Earl of Wemyss, as heir of entail next in succession to the estate of Niedpath, raised an action of declarator and damages against the Duke of Queensberry, the heir in possession, to have it found that certain leases, granted by him on grassums, were ultra vires. He,

Jan. 14, 1823.
FIRST DIVISION.
Lord Hermand.
H.

at the same time, brought a reduction of the leases, and, in particular, of one in favour of the defender Murray.* The Duke died in 1810, and his executors were called in his place. On the 14th of June 1814, the Lord Ordinary, by a special interlocutor, decerned in terms of the libel in both actions; and the Court, after a hearing in presence, by a majority, pronounced an articulate judgment, (3d February 1815), of new decerning as libelled; and to this they adhered on the 29th of November 1815. At this time, the same question of law was depending in the Second Division between the Duke of Buccleuch and the executors of the Duke of Queensberry,† where a contrary decision was pronounced. Both cases were appealed; and, after being heard, a remit was made in the Buccleuch case to take the opinions of all the Judges, and to reconsider the judgment. Ten of their Lordships held, that the decision of the Second Division was correct, and it was adhered to by a majority of four Judges to one. That case was again appealed, when the House of Lords, on the 12th of July 1819, found, 'that the said William, late Duke of 'Queensberry, had not power, by the entail founded 'upon by the parties in this cause, to grant tacks, 'partly for yearly rent, and partly for prices or sums 'of money paid to himself; and that tacks granted 'by him upon the surrender of former tacks, which 'had been granted partly for yearly rent, and partly 'for prices or sums of money paid to himself, as be-'tween the persons claiming under the entail, ought 'to be considered as set with evident diminution of

* See Earl of Wemyss against Murray and others, 17th November 1815, Fac. Coll.

† See 7th March 1816, Fac. Coll.

'the rental.' The House of Lords then resumed consideration of the case of the Earl of Wemyss, pronounced a similar judgment, and remitted it to be proceeded in accordingly. The defenders next insisted that they were entitled to purge the irritancy: but this plea was repelled, and decree of removing was issued. The point now remaining for decision related to a claim made by the Earl of Wemyss for violent profits from 1811, when he succeeded to the estate, against Murray, the tenant, and for damages against the executors. Murray pleaded bona fide consumption, which defence he rested on the great doubt and uncertainty as to the law of this case,—that, from the decision by the Second Division, and the opinions of the Judges in the Buccleuch case, he was entitled to assume that his lease was valid; and that, at all events, he was, in these circumstances, in bona fide to take the judgment of the House of Lords. The executors contended, 1. That as the action had been brought during the life of the Duke, the conclusion for damages was inept.* 2. That no action of damages was competent for the contravention of an entail. 3. That the damages claimed were truly violent profits, and were exigible only from the tenants; and that, at least, they were entitled to avail themselves of his plea of bona fides. The Court, on the report of the Lord Ordinary, found 'the defenders liable in damages from the 'term of Martinmas succeeding the judgment of 'the House of Lords, dated 12th July 1819 years.' And a petition by the executors of the Duke of

* This objection was obviated by bringing a new summons against the executors.

Queensberry, for explanation, was refused as unnecessary.'*

Their Lordships were agreed, that, from the very great doubt attending this case, and the prevailing opinion, that grassums might be legally taken, they could not find the defenders to be in mala fide, earlier than the period mentioned in the interlocutor.

Murray's Authorities.—2. Stair, 1, 24; 50, Dig. 16, l. 109; 2. Ersk. 1, 25 and 27; *Elliot, Jan. 22, 1793, (15622); Elliot, Jan. 16, 1798, (15450); Lord Elgin against Wellwood, 1810; Duke of Hamilton, June 6, 1815; Law against M'Gill, 1798; Turner, March 3, 1820, (F. C.); Bonny, July 30, 1760, (1728); Grant, Feb. 9, 1765, (1760).

Pursuer's Authorities.—2. Ersk. 2, 25; 1. Bankt. 8, 12; 1. St. 7, 12; Queen's College, May 25, 1742, (7934); Bethune, Jan. 1684, (7967); Town of Glasgow, Nov. 28, 1685, (1. Fount. 379); Denham, Jan. 15, 1761, (15512); Leslie, March 2, 1779, (15530); 2. St. 1, 24; 2. Ersk. 1, 25 and 28; Cuninghame, Feb. 19, 1635, (1738); Gray, Feb. 23, 1672, (1751); Milne, July 19, 1715, (1759); Oliphant, Nov. 30, 1790, (1721); Hunter, June 2, 1760, (1753); Fumartoun, July 15, 1675, (1755); Lord Balcarras, Feb. 10, 1735, (1760).

Executors Authorities.—(1.)—2. Connell on Tythes, 133; Marquis of Queensberry against Executors of Duke of Queensberry, May 26, 1820, (House of Lords); Gibson against Sir W. Forbes, Dec. 16, 1817, (F. C.) (in House of Lords).—(2.)—1685, c. 22; Stewart, July 8, 1789, (15535); Brown, May 25, 1808, (Ap. Tailzie, No. 19); Bryson, Jan. 22, 1760, (15511); Lord Ankerville, Aug. 8, 1787, (7010); Bruce, Jan. 15, 1799, (15539).—(3.)—2. Ersk. 6, 54, 2. Ersk. 1, 28 and 29, and cases referred to by the tenant.

Pursuer's Authorities.—(2.)—3. Ersk. 8, 23; 1. Bankt. 584; 3. St. 3, 59; Hopes, Min. Prac. 402; 3. Ersk. 3, 86.

* This and the four following cases noticed in Lord Alloway's speech in the Buccleuch case, p. 15.

RUSSELL, ANDERSON, & TOD, W. S.—W. LAWRIE, W. S.—J. TWEEDIE, W. S.—Agents.

* Leave to appeal the above judgment was granted on the application of the Earl of Wemyss and the executors of the Duke of Queensberry.

No. 109.

J. COGGAN, Advocator.—*Robertson.*
INCORPORATION of TAILORS of EDINBURGH, Respondents.—*Skene.*

Jan. 14, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Soldier—Exclusive Privilege—Stat. 8. Geo. III, c. 8.—Coggan, a broker of clothes, married the daughter of a soldier, under whose name and superintendence the business of a tailor was carried on in Edinburgh. The Incorporation of Tailors presented a complaint to the magistrates, alleging that Coggan had violated their privileges, and concluding for damages and interdict. In defence, he stated, that he never acted as a tailor,—that he was incapable of doing so,—and that the business was carried on entirely by his wife, who sisted herself as a defender in the action. Two points arose, 1. Whether the wife was bona fide 'apt and able' to act as a tailor? and, 2. Whether this was a collusive device to confer on the husband the statutory privilege? The inferior court, after finding 'that the daughter of a soldier 'cannot confer the statutory privilege on her husband, but is, herself, entitled to carry on any trade 'she is apt and able for, notwithstanding her marriage;' allowed a proof; and, thereafter, found, that 'the present is an attempt, by the daughter of 'a freeman, to confer the statutory privilege on her 'husband, in opposition to its true meaning and intent,' decerned for damages, and granted interdict. In an advocation, the Lord Ordinary found, 'that 'the daughter of a soldier, entitled to the statutory 'privilege, may carry on any trade for which she is 'able and qualified, provided she is bona fide employed in that trade; but that her husband, merely

'in her right, is not entitled to this privilege :—that 'Coggan is entitled to carry on the business of a 'broker of clothes without any licence from the tail- 'or craft, provided that he does not, as a tailor, 'make or alter the clothes in which he deals,— 'that Coggan, not having been bred a tailor, had 'employed persons to make and alter the clothes in 'which he dealt, and had, on that account, paid a 'licence, to the tailor craft, of two guineas per an- 'num,—that, upon their insisting to raise it to four 'guineas, Coggan, by this time, having been married 'to the daughter of a soldier, entitled to the pri- 'vilege of carrying on any business for which she 'was apt or qualified, his wife's name was put upon 'the shop,—that there is evidence that Mrs. Coggan 'cuts clothes and other materials for the purpose of 'being made into trowsers, drawers, vests, and gait- 'ers,—that she employed a foreman in the shop, for 'taking the measures of gentlemen, and that she not 'only worked herself, at some parts of the business, 'but that she employed Jean Sommerville, and other 'tailors,—that she appears apt and able to conduct 'the business, and that, therefore, there is nothing in 'the statute which can deprive her of the benefit of 'that privilege.' His Lordship, therefore, advocated the cause, and assoilzied Coggan. The Court refused a petition, without answers.

Respondents' Authorities.—Tailors of Glasgow, March 25, 1777, (Ap. Burgh R. No. 3); Shoemakers of Perth, Feb. 24, 1790, (2014); Manson, Dec. 16, 1795, (2015).

W. POLLOCK—J. MACANDREW,—Agents.

W. Todd, Pursuer.—*M'Farlane—Jeffrey.*
General Moncrieff, Defender.—*Clerk—Greenshields.*
P. G. Skene, Defender.—*Cranstoun—Maconochie.*

No. 110.

Jan. 14, 1823.

First Division.
Lord Gillies.
D.

Tailzie—Tack.—By the entail of Hallyards and Pitlour, the contracting of debt is prohibited. In 1807, Mrs. Skene, the heir in possession, granted to Todd a lease of part of the lands, and also of a mill, by which, in consideration of a steading of houses to be erected by Todd, of the value of £620, she bound 'herself or the said proprietor of the lands, at the 'end of the lease, to pay the said William Todd, his 'heirs and assignees, the foresaid sum of £620, and 'that at the expiration of this tack, with interest;' also 'to allow the said William Todd and his 'foresaids, out of the rent crop 1813, the sum of '£21, and the like sum of £21 yearly, during the re-'maining years of the tack after crop 1813.' The value of the machinery of the mill was estimated at £21 : 17 : 8, with regard to which it was stipulated, that Todd should 'keep and leave the lying 'and going gear of the like value; and, in case the 'same shall be of less value, then the tenant is to 'pay the difference; but if of greater value, the pro-'prietor to pay the difference, not exceeding £50 'sterling, at the end of the lease.' The tack contained a clause of warrandice against Mrs. Skene, 'her heirs and successors,' but the obligations were not constituted as burdens on the next heir of entail, in terms of the 10. Geo. III. On the death of Mrs. Skene, in 1816, she was succeeded by Mr. Skene as heir of entail, and was represented by General Moncrieff as her executor and disponee.

Mr. Skene having refused to implement the above obligations in the tack, Todd raised action against General Moncrieff, to have it found, that he, as the representative of Mrs. Skene, was bound to perform them; and General Moncrieff brought an action of relief against Mr. Skene. The ground on which General Moncrieff rested was, that as, by the terms of the lease, the obligations were imposed upon the proprietor of the lands for the time being, the tenant must insist against Mr. Skene; and that, at all events, as Mr. Skene was alone to be benefited by the erection of the houses and the improvement of the machinery of the mill, he was bound, ex equitate, to give relief. The plea of Mr. Skene was, that the entail prohibited the contracting of debt, and as the terms of the statute 10. Geo. III, had not been observed, he was not liable. The Lord Ordinary decerned against General Moncrieff, and assoilzied Mr. Skene. To this interlocutor the Court adhered

General Moncrieff's Authority.—1. Ersk, 8, 6.

Mr. Skene's Authorities.—Leslie, March 2, 1779, (15530); Dillon, Jan. 14, 1780, (15432); Webster, Dec. 1791, (15439, and Bell's Cases, No. 7, Entail); Taylor, 1792, (Bell's Cases, No. 8, Entail).

TOD & WRIGHT, W. S.—YOUNG, AYTOUN, & RUTHERFORD, W. S.—THOMSON & CAMPBELL, W. S.—Agents.

No. 111.

T. LARKIN, Suspender.—*More.*
D. SMITH, Charger.—*Neaves.*

Jan. 14, 1823.

SECOND DIVISION. Bill-Chamber. Lord Mackenzie. M'K.

Reference to Oath.—Larkin presented a bill of suspension of a charge on a bill of exchange at Smith's instance, and offered to prove, by reference to his oath, that he held the bill for behoof of his brother, and had

consented to be bound by his brother's accession to a trust-deed executed by Larkin for behoof of his creditors, by which accession the creditors obliged themselves to abstain from using diligence. The Lord Ordinary refused the bill, 'in respect it is presented without caution;' but the Court remitted to allow the reference.

W. & A. G. Ellis, W. S.—James Lyon,—Agents.

R. Bontine, Pursuer.—*Jeffrey—Blackwell.*
R. B. Dunlop, Defender.—*Jameson—Spiers.*

No. 112.

Jan. 15, 1823.

Second Division.
Lord Cringletie.
B.

Process—Reduction and Declarator—Tailzie—Title to pursue.—Bontine raised summons against his father, Graham of Gartmore, concluding to have it declared, that Graham 'had incurred an irritancy of, and 'forfeited' his right to the entailed estate of Ardoch, in consequence of having failed to bear the name of 'Bontine of Ardoch,' in terms of the entail, and that his titles ought to be reduced. Graham having consented to hold the summons executed, and to pass from the induciæ, the case was enrolled, and great avizandum craved. Appearance was at this stage made for Dunlop, who had purchased from Graham the superiority of certain lands wherein he was vassal, and which superiority was part of the entailed property. The Lord Ordinary sisted him as a party; and, in reference to an objection by him, found, 'that until the pursuer declares an irritancy 'against his father, he has no title to pursue a re-'duction of his father's title to the estate of Ardoch; 'and, in respect that he declines at present to insist 'in the declaratory conclusions of his libel, dismisses

'the action, and decerns.' Bontine reclaimed, and pleaded,—1. That Dunlop had no title to appear; and, 2. That it was the invariable practice, in actions of reduction and declarator of irritancy, to make great avizandum with the productions, reserving all objections as to title. The Court held,—1. That Dunlop had a good right to appear and defend his author's titles; and, 2. That the pursuer must first have the irritancy declared against his father, before he can insist in the reductive conclusions, and to that extent adhered. But, as the pursuer now stated his intention to proceed with the conclusions of irritancy, they recalled the interlocutor, in so far as it dismissed the action, and remitted to the Lord Ordinary to proceed accordingly.

CARNEGY & SHEPHERD, W. S.—A. CONNELL, W. S.—Agents.

No. 113. JAS. ANDERSON, (Assignee of SOMERVILLE and SON), Pursuer.—*Moncreiff*—*Matheson*.
MAGISTRATES of DINGWALL, Defenders.—

Jan. 15, 1823.

SECOND DIVISION. Lord Cringletie. F.

Act of Grace.—Monro was incarcerated for debt in the jail of Dingwall, by Walker and Son, and thereafter arrested in jail by Somerville and Son, for a debt due to them. Monro applied to the magistrates for an aliment, under the Act of Grace. The application was intimated to Walker and Son, but not to Somerville and Son. Monro having made oath, the bailies modified an aliment. Intimation was then made to Somerville and Son, of the application, and proceedings thereon; and, after the lapse of more than ten days thereafter, no aliment having been lodged, Monro was liberated. Anderson, as

assignee of Somerville and Son, raised action against the bailies, for payment of the debt due by Monro, on the ground that his application having been at first intimated to Walker and Son only, and the oath & modification of aliment having been thus made in absence of Somerville and Son, must be held, as to them, never to have taken place, and that the bailies, therefore, had liberated Monro illegally, and rendered themselves liable for the debt. The Lord Ordinary assoilzied them, but found no expences due. Both parties reclaimed. Anderson as to the merits, and the bailies as to expences. The Court holding, that it was not required by the Act of Grace that the oath of the debtor, and the modification of aliment, should be made in presence of the creditors, adhered on the merits, and found the bailies entitled to expences.

Defenders Authorities.—Dowie, Jan. 27, 1736, (11809); Boyle, July 8, 1714, (11805).

R. Rutherford, W. S.—J. Macdonnell, W. S.—Agents.

P. Duff, Petitioner.—*Cranstoun—Cuninghame.*
Magistrates of Elgin, Respondents.—*Clerk—Ivory.*

No. 114.

Jan. 16, 1823.

First Division.
D.

Public Officer—Nobile Officium.—Duff, town-clerk of Elgin, having succeeded to heritable property within that burgh, applied to the Court to authorize and ordain the magistrates 'to appoint the sheriff-'clerk of the shire of Elgin, or any other notary-'public, upon the petitioner's application, to execute 'the office of town-clerk of that burgh, pro hac vice, 'in taking all necessary infeftments in favour of the

'petitioner, as heir to his father in the subjects be-
'fore mentioned, or as otherwise having or acquir-
'ing right to property within the said burgh; or in
'favour of third parties, in case of his selling, or
'granting securities over his burgage property.'
The Court granted warrant, as prayed for, to the sheriff-clerk, which was extracted. Of this the magistrates afterwards complained; 1. Because they had the sole right of nomination; 2. That the warrant was incompetent, as being beyond the nobile officium of the Court; and, 3. That it was too broad. They did not, however, pray for a recal of the warrant. The Court dismissed the complaint.

Æ. M'Bean, W. S.—Inglis & Weir, W. S.—Agents.

No. 115.

E. Black and Others.—*Pyper.*
Common Agent in the Ranking of Shand's Creditors.—*Baird.*
Competing.

Jan. 16, 1823.

First Division. Lord Meadowbank. D.

Sexennial Prescription—Confirmation—Process.—In a ranking and sale of the estates of Shand, the Common Agent stated the following objections to the claims of some of the creditors.—

1. Shand had granted to Agnes Black a bill in 1813, of which the interest, and part of the principal, were paid after her death, to her sister, Elizabeth, in the course of the years 1814, 1815, 1816. Of these payments there were regular entries in Shand's books. Elizabeth thereafter obtained decree in absence, on the bill, and led an adjudication against his estate. After these decrees had been extracted, she was confirmed executor of her sister. The adjudication was objected to as inept, because she had not

been confirmed at the date of the decree. The Lord Ordinary sustained the objection ; but the Court altered his interlocutor, and repelled it.

2. A claim was made by Douglas, founding on a bill dated in 1810, and a decree in absence in 1818. There were markings of payment of interest on the back of the bill *within* six years, and an entry in Shand's books, made by his clerk *beyond* that period. The common agent objected, that the bill was prescribed at the date of the decree. The Lord Ordinary rejected the claim; but the Court, in respect of the entry in the books, and of the decree, sustained it.

3. Various other claims were made on bills accepted by Shand, and decrees in absence obtained against him after the lapse of the sexennial prescription. The Lord Ordinary refused to rank any of these claims, holding them to be prescribed. Against this judgment, the creditors reclaimed, and pleaded, first, that, as there were regular entries of payment of the interest, and none of the principal sum in Shand's books, this was negative evidence of the existence of the debts; and, second, that, at all events, the decrees in absence afforded sufficient proof of this in a question with the common agent;—that he was not entitled to object prescription in opposition to these decrees;—and that this was competent only to Shand, who, however, had not attempted to set them aside, as he knew that resting owing could be proved by his oath. The Court, in respect of the second plea, found the creditors entitled to be ranked.

In reference to Douglas's claim, it was observed, that this was not like the case of Ferguson, where the entry was not in the debtor's but only in the factor's books.

Creditors Authorities.—(1.)—Watson, June 19, 1782, (7009); Arbuthnot, Nov. 27, 1789, (14383).—(2. and 3.)—Campbell, May 19, 1797, (1648); Lesslie, Nov. 15, 1808, (F. C.)

Common Agent's Authorities.—(1.)—Park, June 28, 1785, (14382); Arbuthnot, Nov. 27, 1789, (14383); Richardson, Feb. 19, 1784, (14377); Macdowal, June 29, 1784, (14404); Sloan Lawrie, July 27, 1779, (3918); Alison, May 26, 1802, (3922).—(2. and 3.)—Horsburgh, Feb. 13, 1811, (F. C.); Ferguson, March 7, 1811, (F. C.)

J. MORRISON, W. S.—H. G. DICKSON, W. S.—Agents.

No. 116.

W. GRAY, Complainer.—*Spiers.*
J. DIXON, Respondent.

Jan. 16, 1823.

FIRST DIVISION. D.

Freehold Qualification.—Dixon having been enrolled as a freeholder of Dumbartonshire, on a crown feu-charter and sasine, Gray presented a complaint to the Court, praying, to order his name to be expunged, in respect that the retour produced did not instruct an adequate valuation,—the valuation in time of peace being £5 : 3 : 4; and the feu-duty £5, and 3s. 4d., in augmentation of the rental. The Court (in absence) granted the prayer of the petition.

Gray's Authorities.—Wight, 179, and cases there referred to; Colquhoun against Douglas, June 18, 1822, (Ante, Vol. I, No. 586).

G. DUNLOP, W. S.— —Agents.

No. 117.

T. RUSSELL and Others, Suspenders.—*Jeffrey—Jameson.*
P. COCKBURN, Charger.—*Moncrieff—Clephane.*

Jan. 16, 1823.

FIRST DIVISION. Bill-Chamber. Lord Mackenzie. H.

This was a question as to passing a bill of suspension of a charge by an indorsee on a bill of exchange. The Lord Ordinary refused it: but the Court, on an offer of consignation, remitted to pass the bill.

RUSSELL, ANDERSON, & TOD, W. S.—W. GUTHRIE,—Agents.

D. CLYNE, Pursuer.—*Boswell.*
T. and R. THOMSON, Defenders.—*Maitland.*

No. 118.

Jan. 16, 1823.

SECOND DIVISION.
Lord Cringletie.
B.

In an action at the instance of Clyne, a writer, for the expence of drawing a bond of caution, the Lord Ordinary assoilzied the defenders, and the Court adhered, in respect of its appearing, that they had not authorized him to prepare the bond.

D. CLYNE—H. J. WYLIE,—Agents.

F. A. KELTING and Mandatories, Pursuers.—*Baird.*
J. and W. JAY, Defenders.—*Bell—Ivory.*

No. 119.

Jan. 16, 1823.

SECOND DIVISION.
Lord Pitmilly.
F.

Freight—Principal and Agent.—Kelting agreed, by bill of lading, to convey a cargo of flax, &c. from Riga to Leith, deliverable to John Jay and Company, merchants there, or their assignees, 'he or 'they paying freight of the said goods.' Previous to its arrival, Jay and Company had indorsed the bill of lading to Duncan, a merchant in Glasgow, for sale on their account, who was to accommodate them with an advance of two-thirds of the invoice amount. When the vessel arrived at Leith, Jay and Company bargained with the master to deliver the cargo at Grangemouth, which he accordingly did to an agent of Duncan, by whom a part of the freight was paid, and an order granted on Jay and Company for the balance. No notice, however, of the indorsation of the bill of lading to Duncan was ever given. Jay and Company having refused payment, Kelting raised action against them and Duncan, in the Court of Admiralty, where decree was pronounced against Duncan; (to which the Court

of Session, in a suspension, adhered;) but Jay and Company were assoilzied. In the meantime, Duncan having become bankrupt, Kelting instituted the present action of reduction of the absolvitor of J. Jay and Company, and to have the defenders, as partners of that company, found liable for the freight. The Lord Ordinary reduced and decerned in terms of the libel, and the Court adhered.

The Court were of opinion, that although Jay and Company had assigned the bill of lading, yet as they still retained an interest in the cargo which was to be sold by Duncan for their behoof, they were liable in payment of the freight.*

Defenders Authorities.—2. Holt, 63, 164–5.

JOHN PEAT—W. DALLAS, W. S.—Agents.

No. 120.

W. GRAY and Others, Pursuers.—*Forsyth—Cullen.*
GUILDRY of ARBROATH, Defenders.—*Moncreiff—Ivory.*

Jan. 16, 1823.

SECOND DIVISION. Lord Cringletie. B.

Burgh—Corporation—Prescription.—By contract in 1737, the Magistrates of Arbroath, in consideration of a sum of money advanced by the brewers of that town for the building of a harbour, agreed that two of the brewers, (being guild-brethren), to be elected by the fraternity, should be admitted members of the guild-council. The guildry, by a minute of the same date, became bound to admit 'two of

* The defenders in this case, having, pending the action, become resident abroad, the pursuer insisted, that they should produce a mandate to some one in this country, but the Court held it unnecessary.

'the brewers, whom they themselves shall choose, 'to be members of the guild-council.' The brewers had been in constant use, (with the exception of a few years), to elect two of their number, who were admitted as guild-councillors, down to 1818, when the guildry having refused admission to the members chosen by the brewers, the present action was raised, to have it declared, that two of the members of the fraternity of brewers, elected by them, (being guild-brethren), were entitled to a seat and vote in the Dean of Guild's council. The guildry pleaded in defence, 1. That the brewers having no seal of cause, and being rendered incapable, by acts 1567, c. 29, and 1669, c. 15, of becoming a corporation, could not acquire a right as a corporate body; and, 2. That they had no title on which to prescribe a right like that claimed, nor had continual possession for forty years consecutively taken place. The Lord Ordinary and the Court decerned and declared in terms of the libel.

Their Lordships held, 1. That although the brewers might not form a corporation, properly speaking, yet, being a fraternity established and sanctioned by the magistrates of the burgh, and enjoying the privilege, by their dean, of a vote in the election of the magistrates, they were capable of acquiring a right to themselves, as a body. 2. That the onerous contract with the magistrates in 1737 was a sufficient title to prescribe; and that there having been constant possession since that period, without interruption, it was of no consequence that the brewers had not exercised their privilege during certain short periods.

Pursuers' Authorities.—Wrights of Glasgow, March 8, 1765, (1961); Maltmen of Glasgow, Jan. 25, 1749; (Elchies, 30, Prescr.); Tailors of Perth,

Dec. 10, 1776, (1947); Tailors of Potterrow, Jan. 26, 1776, (7709); Shirving, &c. Jan. 19, 1803, (10921).

Defenders Authorities.—1567, c. 29; 1669, c. 15; Mackenzie's Observations, p. 434.

FOTHERINGHAME & LINDSAY, W. S.—RO. PLAYFAIR,—Agents.

No. 121. J. KNOX and SONS and their CAUTIONERS, Advocators.—*T. H. Miller—Jameson—Robertson.*
W. DUNN, Respondent.—*Jeffrey—More.*

Jan. 17, 1823.

SECOND DIVISION. Lord Pitmilly. B.

Summary Process.—Dunn presented a summary application to the Magistrates of Glasgow against Knox and Sons, alleging that they had received a sum of money from one Clark, to be handed over to him, in payment of a bill due by Clark, and praying to have them ordained immediately to pay the funds so lodged in their hands. The cause having been removed into this Court by advocation, at the instance of Knox and Sons, Dunn thereafter raised an ordinary action against them for the contents of the bill, on this separate allegation, that they had guaranteed its payment. These processes having been conjoined, the Lord Ordinary, after a proof, decerned against them in both processes. The cautioners in the advocation for Knox and Sons, (who had now become bankrupt), petitioned, and contended, that the summary application to the magistrates was incompetent; and that decree should have been given against Knox and Sons in the ordinary action only. The Court considered that the grounds of Dunn's application were completely established by the proof, and were quite sufficient to warrant a summary application, and they, accordingly, adhered.

D. BALLINGALL, W. S.—W. & A. G. ELLIS, W. S.—Agents.

A. PAGAN and Others, Pursuers.—*More.* No. 122.
W. EATON and Others, (Trustees of J. CAMPBELL), Defenders.—*Cranstoun—Jameson.*

Jan. 17, 1823.

SECOND DIVISION. Lord Cringletie. B.

Trust-Deed—Jus Quæsitum Tertio.—Campbell executed a trust-deed of part of his heritable property, in favour of the defenders, chiefly with the view of raising money to stock a farm for his son, but bearing to have for its first object, 'to pay off all his 'lawful debts,'—to do which, the trustees were empowered to sell the lands. The trustees were infeft, and their infeftment recorded,—and Campbell's affairs having become embarrassed, they, several times, advertised for meetings of his creditors. No creditor, however, appeared, or made any claim on the trustees, or acceded to the trust, and the greater number of them had accepted renewals of their obligations from Campbell subsequently to the date of the trust-deed. Campbell, having, at last, become quite insolvent, Pagan and others, his creditors, brought an action of count and reckoning against the trustees, who, on their part, raised a multiplepoinding, which processes were conjoined. The creditors objected to the accounts of the trustees, that they had paid out of the trust-funds to Hunters and Company, bankers, the amount of certain bills which had been originally granted by Campbell to Kennedy (one of the trustees) in payment of rent, and which Kennedy had indorsed to Hunter's and Company; and they contended, 1. That the registration of the infeftment of the trustees vested a right in the creditors, under the trust-deed, which the trustees were not entitled to affect by a preference of any individual creditor; and,

2. That Hunters and Company having merely come into the place of Kennedy, one of the trustees, payment to them was the same thing as if payment had been made by the trustees to one of their own number. The Lord Ordinary and the Court repelled the objections.

Their Lordships were of opinion, that, as the creditors had not acceded to the trust-deed, which was intended, not so much for their behoof, as for a private purpose, no interest was vested in them under it; and that Hunters and Company, being onerous holders of the bills, and having threatened diligence against Campbell, the trustees were not only entitled, but bound to pay them.

Pursuers Authorities—2. Bell, 583; Bruce, June 23, 1675, (17000); Leckie, Nov. 22, 1776, (11581).

ARCHD. CRAUFURD, W. S.—DONALDSON & RAMSAY, W. S.—Agents.

No. 123.

W. WELSH, Advocator.—*Gillies.*
S. KER, Respondent.—*More.*

Jan. 17, 1823.

SECOND DIVISION. Lord Pitmilly.

B.

Reference to Oath.—Ker pursued Welsh before the Sheriff of Dumfries for implement of an alleged cautionary obligation, and founded on a written missive subscribed by Welsh. The missive being informal, and vitiated in essentialibus, and Ker offering no other proof of the alleged obligation, the Sheriff assoilzied Welsh. After the interlocutor became final, Ker gave in a minute, proposing to prove, by reference to Welsh's oath, 'the nature and extent of 'the obligation he came under to the pursuer.' The Sheriff sustained the reference. Welsh advocated;

and the Lord Ordinary, 'in respect the point referred to the defender's oath is not whether he subscribed the written obligation libelled, and which is a vitiated document, but whether he entered into a verbal obligation, the nature and extent of which is to be referred to his own oath,' repelled the reasons of advocation, and remitted simpliciter. Welsh petitioned, and pleaded, that it was incompetent to prove a verbal obligation of this nature by reference to oath; that the reference made in the Sheriff-court, in point of fact, related to the written obligation;—and that, at all events, Ker should be obliged to give in a special reference of the facts relative to the alleged verbal obligation. Ker having lodged such a minute of reference, the Court, 'in respect of the minute of reference now given in,' refused the petition.

WELSH & EWART, W. S.—JAS. PATTISON, W. S.—Agents.

W. S. GLASS, Pursuer.—*Greenshields—Cockburn—Alison.*
G. PENTLAND, Defender.—*Clerk—Fullerton.*

No. 124.

Jan. 18, 1823.

FIRST DIVISION. D.

Cessio Bonorum.—Glass having been imprisoned in November 1821, raised a process of cessio bonorum, which was opposed by Pentland. The chief grounds of opposition were, that he had indulged in great extravagance;—that he enjoyed a large allowance from his father, which, by his own influence, had been excluded from the diligence of his creditors;—that, after contracting his debts, he had, by a postnuptial transaction, deprived himself of his jus mariti over his wife's fortune;—and that with her money he had pur-

chased in favour of trustees for her exclusive behoof, a valuable villa. It was, therefore, contended, that he was not entitled to the cessio, until he had removed those obstacles to the diligence of his creditors, by the same influence by which he had obtained them; and, at all events, that he was bound completely to explain and justify them. The Court, not being satisfied with the disclosure made by Glass, repeatedly refused the cessio; but at last, after considerable investigation, decerned in his favour.

Pursuer's Authorities.—2. Bell, 500; Macdowall, Mar. 5, 1791, (11793); Douglas, Jan. 15, 1794, (11795); Law, Dec. 12, 1795, (11798); M'Lean, March 1802, and House of Lords, Aug. 1803, (Not rep.); Thom, Feb. 11, 1809, (F. C.); Murray, July 11, 1811, (F. C.); Smith, Feb. 6, 1813, (F. C.); Dalgleish, July 4, 1801, (Not rep.); Boyes, Winter Session, 1808, (Not rep.); 1. Bell, 35; 1. Ersk. 6, 14.

CAMPBELL & ARNOTT, W. S.—W. DOUGLAS, W. S.—Agents.

No. 125. E. BAILLIE and Others, Petitioners.—*Matheson—Cockburn.*

LADY SALTOUN, Respondent.—*Jeffrey—Robertson.*

Jan. 18, 1823.

SECOND DIVISION. F.

Interim Execution.—The case between these parties (See ante, Vol. I, Nos. 262 and 613,) having been appealed, an application was made for interim-execution. The Court refused to order the demolition of a weir across the Ness, which they had ordained to be removed, the injury arising from which to the petitioners, had been assessed by verdict of a jury at only 41s.; but granted execution for expences, though not modified at the time of appeal.

THOS. MACKENZIE, W. S.—J. B. FRASER, W. S.—Agents.

GEO. SMELLIE and COMPANY, and Others, Advocators.—*Murray—R. Thomson.*
GEO. FORMAN, Respondent.—*Gillies.*

No. 126.

Jan. 18, 1823.

SECOND DIVISION.
Bill-Chamber.
Lord Robertson.
M'K.

Act of Grace.—Forman applied to the magistrates of Glasgow, for an aliment under the act of grace, and made oath that he had not wherewith to support himself. Smellie and Company, and other creditors, opposed his application, alleging, that, as he had not given a satisfactory account of the defalcation of his funds, he must be presumed to have secreted part of his property. The magistrates having modified an aliment, the creditors presented a bill of advocation. The Lord Ordinary refused the bill, and the Court adhered.

The Judges expressed an opinion, that, although the debtor's oath did not prevent the creditors from proving that he had actually secreted his funds, yet that, in this case, there was no evidence of any fraudulent abstraction of his property, but merely a failure to account satisfactorily for his bankruptcy.

RO. PAUL, W. S.—W. WILLIAMSON,—Agents.

J. BRYCE, Petitioner.—*Cockburn—Rutherfurd.*
W. GRAHAM, Respondent.—*Clerk—Jameson.*

No. 127.

Jan. 21, 1823.

FIRST DIVISION.
H.

Curator Bonis—Fatuity.—Graham was appointed by the Court curator bonis to Bryce, who had succeeded to a large sum of money, and who, it was alleged, was fatuous. Thereafter, a petition for recal of the curatory was presented by Bryce, along

with certain persons, his interdictors. The grounds of recal were principally that Bryce was not a proper subject to be put under the care of a curator; and that, at all events, cognition by a jury was the only process for a declaring a person in a state of fatuity. The Court, (Feb. 19, 1819, by a majority), after a proof, refused the petition; and, in the circumstances, found Mr. Steele, agent for Bryce, liable in expences. Against this judgment, an appeal was entered in name of Bryce, (the interdictors having withdrawn), which at first was dismissed, from a failure to enter into the recognizance required by the standing order of the House; but, thereafter, it was ordered 'that the said appeal be revived, and 'that the said standing order, under the circumstances of the case, be dispensed with, if the Court 'of Session, upon application being made to them, 'should not think proper to furnish the petitioner 'with funds out of the hands of his curator de bonis 'for prosecuting the said appeal.' A petition to this effect was refused by the Court.

A. Steele, W. S.—T. Johnstone,—Agents.

No. 128.

J. Maxwell, Suspender.—*Pyper.*
Drummond's Trustees, Chargers.—*Cuninghame.*

Jan. 21, 1823.

First Division.
Bill-Chamber.
Lord Balgray.

Process—Sale—Trustee—1696, c. 5.—On the 6th of July 1810, Maxwell granted to Drummond an heritable bond, and disposition in security, for £500, over certain houses, with a power of sale; and, at the same time, Drummond gave a missive, declaring, that the bond was intended 'for security of certain 'sums in which I am bound for you, or otherwise.'

Soon thereafter, Maxwell's estate was sequestrated, and Drummond, as his cautioner to a bank, was obliged to pay a balance on a cash credit, which, together with other debts, amounted to the sum in the bond. After Maxwell had obtained a judicial discharge, Drummond applied to the Sheriff for warrant to sell the heritable subjects, which, after various proceedings, was granted. This process was, on Drummond's death, insisted in by his trustees, who exposed the subjects to sale, under articles and conditions of roup; one of which was, that the purchaser should instantly find caution. The property was bought by the trustees, and the Sheriff ordained Maxwell to subscribe a disposition in their favour. This decree having been extracted, a charge was given on it, against which, Maxwell presented a bill of suspension, on the grounds, 1. That the process being still in dependence, and no warrant having been granted to extract the decree, the charge was illegal; 2. That, as the condition of the sale had not been complied with, by finding caution, the trustees had no right to demand a title; 3. That, as exposers of the property, and acting as trustees for his eventual interest in the reversion, they could not legally become purchasers; and, 4. That the bond, being granted for a future debt, was null on the act 1696, c. 5. The Lord Ordinary refused the bill, in respect, 1. That 'the bond and disposition in security, with power of 'sale, granted by the complainer to the late Robert 'Drummond, appears to be a valid and legal deed; '2. That the respondents have instructed the late 'Robert Drummond to be an onerous creditor of the 'complainer to the extent stated by them; 3. That 'the sale of the complainer's subjects appears to have

'been conducted in terms of the bond and obligation, 'and under the sanction of the Judge Ordinary; 'and, lastly, That the respondents have declared 'their willingness to allow the complainer to take 'the subjects on payment of the price at which they 'were purchased, which is not offered by the com-'plainer. The Court refused a petition, without answers.

Suspender's Authorities.—(2.)—Buchanan, Jan. 19, 1743, (Elchies, No. 4, Sale); Hannay, July 15, 1758, (14184); Davidson, Jan. 19, 1815, (F. C.)—(3.)—Dig. de Contr. Empt. l. 34, § 7; 3. Vin. 24; 1. Bankt. 7, 19; Cochran, Feb. 17, 1732, (16339); Bee, June 19, 1745, (6008); Crawford, March 6, 1767, (16208); York Buildings Company, March 8, 1793, (13367); Maule, 4. Dow, 379; 2. Bell, 408; M'Kellar, March 8, 1817, (F. C.)—(4.)—2. Bell, 251, and cases there referred to.

J. JOHNSTONE, Junior—W. BENNET, W. S.—Agents.

No. 129.

LORD ADVOCATE, Complainer.
J. DUNCAN, Respondent.—*Jeffrey—Maconochie.*

Jan. 21, 1823.

FIRST DIVISION. B.

Statute, 1701, *c.* 6—*Fraudulent Bankruptcy—Jurisdiction.*—Duncan was, on the 12th of August 1822, imprisoned, till liberated in due course of law, on a warrant from the Court of Justiciary, at the instance of the Lord Advocate, charging him with fraud and fraudulent bankruptcy. On the 14th, he, on the statement that he had been imprisoned for fraudulent bankruptcy, obtained letters of intimation under the act 1701, c. 6, which were executed against the Lord Advocate on the 16th. A petition and complaint, accusing him of fraudulent bankruptcy, was, on the 12th of October, presented by the Lord Advocate to the Lord Ordinary on the Bills, and warrant of service was issued on the 14th, and executed on the 15th. Duncan

immediately applied to the Court of Justiciary for liberation, alleging that he had not been served with an indictment within sixty days, in terms of the statute, and that a petition and complaint was not sufficient. This was refused by Lord Meadowbank, 'in respect of the petition and complaint presented 'by his Majesty's Advocate to the Court of Session, 'and the deliverance thereon by the Lord Ordinary 'on the Bills, and in respect that it is to be inferred 'from the terms of the act 1696, c. 5, and is laid 'down by the authorities, in point of law, that the 'crime with which the petitioner stands charged, 'and for which the warrant on which he is incarcer-'ated was granted, is only cognisable by the Court of 'Session, and not by the Court of Justiciary; re-'serving to the petitioner, if so advised, to apply for 'liberation to the Court of Session, or Lord Ordinary 'on the Bills.' The petition and complaint was moved in Court on the 13th of November; and, on the 14th, Duncan was ordered to lodge answers, which he did on the 26th. On the 28th, and prior to the case being advised, he presented a petition, stating, that although the Lord Advocate had fixed a diet before the expiration of the sixty days, and had continued to insist in the trial, yet he had failed to 'bring it to a conclusion' within the space limited by the statute, and prayed for warrant of liberation. To this the Lord Advocate objected, 1. That the act 1701 was not applicable to the proceedings before the Court of Session, and, therefore, Duncan could not avail himself of its enactments; 2. That even if it did apply, still, as the Court of Session had a privative jurisdiction to try fraudulent bankruptcy, the letters of intimation were irregular, as they had been

obtained from the Court of Justiciary, which was not competent to try that offence. On the other hand, Duncan maintained, 1. That the act 1701 did apply to the Court of Session; 2. That the Court of Justiciary possessed a cumulative jurisdiction, and, therefore, the letters had been issued by a competent Court; and, lastly, That the Lord Advocate, by incarcerating him on charges of fraud and fraudulent bankruptcy, the former of which was undoubtedly cognisable by the Court of Justiciary, was barred from making this objection. The Court, after a hearing in presence, (by a majority), held, 1. That the statute 1701, c. 6, did not embrace the case of fraudulent bankruptcy, and was not applicable to prosecutions before them; and, 2. That they possessed an exclusive jurisdiction of judging in questions of fraudulent bankruptcy, and, therefore, the letters of intimation had not been issued by a competent Court.

The Judges forming the majority were inclined to be of opinion, that the act 1701 was originally intended to apply to the case of fraudulent bankruptcy, and to prosecutions before the Court of Session; but they held, that the contrary had been fixed by decisions, and that it was no longer an open question. The two Judges who were in the minority considered that these decisions were not conclusive; and, at all events, being satisfied that the statute was applicable to the Court of Session, they were bound to regard it in preference to any other authority.

Complainer's Authorities.—(1.)—2. Hume, 107; Rennie, Feb. 24, 1737, (Elch. Wr. Imp. No. 3); Kerr, Nov. 22, 1744, (Ibid. No. 8); Burnett, 380; Stark, July 29, 1748, (3442); Cameron, Aug. 9, 1754; 1. Bankt. 61.—(2.)—1696, c. 5; 1. Hume, 503.—4. Erak. 4, 79; 2. Hume, 98; Burnet, 355.

Respondent's Authorities.—(1.)—Newlands, Feb. 19 and June 17, 1741,

(7331); 2. Hume 102; Burnet, 380.—(2.)—1555, c. 42; 1581, c. 118; Wilson, May 20, 1818; 1. Blackstone, 3; Dunbar, Oct. 3, 1710; Kinloch, May 1731.

A. Rolland, W. S.—R. Playfair,—Agents.

Earl of Rothes, Pursuer.—*Dean of Faculty Ross—Cranstoun—Matheson.*
Countess Dowager of Rothes and Lady G. J. Leslie, Defenders.—*Moncreiff—Skene.*

No. 130.

Jan. 21, 1823.

First Division.
Lord Alloway.
H.

Tailzie—Clause—Provisions to Wives and Children.—By the entail of the estate of Rothes, the heirs were prohibited 'to sell, annailzie, delapidat, or put 'away the foresaids lands and esteat, or any part or 'portion thereof, nor to break, alter, innovat, or in-'fringe the present tailzie, nor contract nor ontake 'debts, nor doe no other fact nor deed, civill nor cri-'minall, whereby the foresaids lands, &c. may be 'anywayes apprized, adjudged, evicted, or forfaulted 'fra them, or anywayes affected in defraud and pre-'judice of the subsequent heirs of taillzie,' &c.; all of which deeds were declared, by the irritant clause, to be, ipso facto, null and void, in so far as to affect or burden the estate. In the resolutive clause, it was declared, that if any of the heirs of tailzie should fail to assume and bear the name and titles of the family, or 'shall break or innovat the said tailzie, or con-'tract debts, or commit any other fact or deed 'whereby the said lands, &c. may be anywayes evict-'ed or affected in manner foresaid, or who shall suf-'fer or permit the saids lands and esteat, or any part 'thereof, to be evicted, adjudged, apprized, or any-'wayes affected for any debts or deeds contracted by 'them before their succession,' then all their right to

the estate should be forfeited, and should, ipso facto, resolve and descend to the next heir. There was a reservation, however, to provide wives and children 'to competent and conveneent lyferents, portiones, 'and provisions, such as the said esteat may conve-'neently bear and allow, and as shall be agreed to 'be two of the nearest friends, the one on the 'father's syde, and the other on the mother's syde, 'the saids lyferents in favours of the husbands and 'wiffes not exceeding at 'one time; and the saids portions and provisions in 'favours of the children, not exceeding the soume of ' and to grand wadsets, 'infeftments, bonds, and other securities requisite 'thereanent; and wherewith the foresaids lands 'and esteat shall stand affected notwithstanding of 'the foresaid provisione and restriction.'

George William, late Earl of Rothes, succeeded, as heir, to the estate in 1810; and, in virtue of the above reservation, he, in February 1811, granted an heritable bond of annuity for £1,366 to his wife, and also, an heritable bond for £12,400, and annualrent thereof, to his two daughters, (one of whom was now dead), payable out of the estate after his death. Infeftment was, soon after the decease of his Lordship in 1817, taken on these deeds; and actions of mails and duties were brought against the next heir and the tenants. Of these deeds, an action of reduction was raised by the heir, on the grounds, 1. That the deeds had not been granted with the consent required by the entail. 2. That the Earl had no power to contract debt on the estate, except under and in terms of the reservation; and that this was sufficiently guarded

against by the prohibitory clause, independent of the irritant and resolutive: and, 3. That if the proper consent was truly procured, the amount of the provisions, which were said to be excessive, ought to be restricted. The allegations as to the want of due consent were, *first*, that one of the consenters, Lord Milsontown, was not the nearest relation by the mother's side; and, *second*, that his consent had been got in consequence of an obligation, that the deeds should not prejudice his right, in the event of his succession to the estate. In defence, it was maintained, 1. That the entail was ineffectual, as the irritant and resolutive clauses did not strike against alienations; and that they only applied to contractions of such debts as might enable creditors to carry off the estate, and not to provisions of the nature of these in question. 2. That the annuity to the widow, being a third of the free rent, and the provisions to the daughters, being the value of three years' rent at the date of the deeds, were such as were convenient for the estate to bear; and, 3. It was denied, that the consent of the proper person had not been got, or that it had been unduly procured. The Lord Ordinary sustained the defences, in respect 'that the provisions called in 'question were granted with the consent of per-'sons authorized by the entail, and as the sum of 'these provisions is left blank in the entail, and the 'mode in which these were fixed seems to have been 'rational and proper at the time they were executed, 'and they were never afterwards altered, either by 'the Earl, or with the consent of the persons with 'whose advice and consent they had been framed; 'and, in respect that the irritant and resolutive 'clauses of this entail do not apply to aliena-

'tions, and do not affect the present infeftments, 'even if they had been granted for sums exceed-'ing the provisions authorized by the entail.' But the Court altered 'the Lord Ordinary's interlocutors 'reclaimed against, so far as they find that the limi-'tations of the deed of tailzie do not apply to, or affect 'the provisions and infeftment in question; and also, 'so far as they find, or may be construed to find or im-'ply, that the said provision was granted with the 'consent of relations duly and rightly obtained, in 'terms of the clause to that effect in the said deed 'of tailzie; find, that the limitations of the said 'deed of tailzie do apply to, and affect the said pro-'vision and infeftment; as also, in respect of the 'circumstances under which Lord Milsintown's con-'sent to the said provision appears to have been ob-'tained: find that his Lordship's consent thereto 'was not duly or rightly obtained, or according to 'the true meaning and purport of that clause in the 'said tailzie, which reserves power to grant compe-'tent and convenient provision to wives and bairns.' Their Lordships, at the same time, appointed counsel to be heard in presence, as to 'the consequences of 'what has now been found respecting Lord Milsin-'town's consent; and also on the question, whether 'the rental for 1810, or the rental for 1816, is to be 'taken as the rule in judging of the fitness and com-'petency of the said provision?' To this interlocu-'tor their Lordships afterwards adhered.

Pursuer's Authorities.—(2.)—3. Ersk. 7, 23; Stevenson, July 26, 1677, (17000); Noble, July 12, 1758, (15606); Gibson, Nov. 24, 1795, (15869); M'Gill, June 13, 1798, (15451).—(3.)—Borthwick, Feb. 1730, (15556); Cant, Dec. 26, 1726, (15554).

Defenders Authorities.—(1.)—Carstairs, Feb. 20, 1672, (8962); Wright and Ritchie, July 9, 1746, (4952).

TAIT, YOUNG, & LAWRIE, W. S.—G. VEITCH, W. S.—Agents.

W. WALLACE, Advocator.—*Jeffrey—M'Neill.* No. 131.
SIR J. COLQUHOUN, Bart. Respondent.—*Cranstoun.*

Jan. 21, 1823.

SECOND DIVISION. Bill-Chamber. Lord Mackenzie.

Sheriff—Declinature.—Wallace presented a bill of advocation of a judgment pronounced by the Sheriff-substitute of Dumbartonshire, in an action at the instance of the respondent, on the plea that the Sheriff-depute being the respondent's brother, both he and his substitute must be held as disqualified from judging. The Lord Ordinary refused the bill, and the Court refused a petition without answers, being of opinion, that where the Sheriff-depute was disqualified, the substitute was entitled to act.

Advocator's Authority.—1681, c. 13.
Respondent's Authority.—1555, c. 39.

J. STUART—D. FISHER,—Agents.

CAMPBELL of Ederline, Pursuer.—*M'Neill.* No. 132.
CAMPBELL of Kildaloig, Defender.—*Jameson.*

Jan. 21, 1823.

SECOND DIVISION. Lord Cringletie. F.

Proof—Witness—Agent and Client.—The pursuer raised action against the defender for payment of the balance of a debt alleged to be due by Petrie, Campbell, and Company, of which company the defender had been a partner. In defence, it was pleaded, that Fraser, the pursuer's attorney, had, in virtue of a mandate, acceded to a composition contract, by which the company was discharged of all its debts, on payment of 15*s.* per pound, and that the pursuer had accepted of the instalments, and otherwise homologated the release granted by his attorney. The pursuer averred, that the mandate was to agree to a

conditional release only, but that as the conditions had not been fulfilled, he was not bound.

The Lord Ordinary granted a diligence 'for the 'recovery of all writings that either party may think 'necessary in support of their respective averments,' to be produced to the commissioner to take such excerpts as he should deem of importance to the cause. Under this diligence, M'Kenzie, W. S. the pursuer's agent in the cause, was examined as a haver, and deponed, that he was in possession of letters on the subject of the claim, both from the pursuer and Fraser to himself, previous to, but with a view to the raising of this action, and also of letters from Fraser to the pursuer, (which last had been delivered to him by the pursuer). He refused, however, to produce them, on the ground that they were all confidential communications between agent and client. The commissioner having ordered production of these letters, the defender gave in a minute, praying the Lord Ordinary to ordain the correspondence to be produced. The Lord Ordinary having refused to do so, and the defender having reclaimed, the Court held that the letters from the pursuer and his attorney, Frazer, to M'Kenzie, were confidential; but found that 'Mr. M'Kenzie is bound to exhibit to 'the commissioner the whole correspondence between 'Mr. Alexander Fraser and Mr. Campbell of Ederline, 'regarding the mandate or instructions given him rela- 'tive to the release, and whatever followed thereon, in 'order that the letters themselves, or excerpts there- 'from, made at the sight of the commissioner, may be 'produced in process;' and remitted to the commissioner accordingly. M'Kenzie being again examined, admitted, that he was possessed of correspondence

between the pursuer and Fraser, on the subject of the claim, but conceiving that they were not embraced in the above interlocutor, he refused to produce them. The commissioner reported to the Court his opinion, that, under the interlocutor, 'the whole correspondence between the pursuer and Mr. Fraser, 'which mentioned in any way the transaction out of 'which the present dispute has arisen, and relative 'both to the original instructions given to Mr. Fraser to sign the release, and also as shewing any 'knowledge on the part of the pursuer, of the terms 'on which the release was signed by Mr. Fraser for 'him, and in any way a knowledge of, and acquiescence in, or an after homologation of the conduct 'of Mr. Fraser, might competently be called for, and 'ought to be produced.' The Court 'approved of 'the judgment of the commissioner, and ordered the 'production to be made as called for by him.'

Pursuer's Authorities.—Executors of Lady Bath, Nov. 12, 1811, (F. C.); 1. Phillips, 240.

Defender's Authorities.—M'Leod, Dec. 21, 1744, (16754); Earl of March, Nov. 21, 1749, (16756); Bower, May 26, 1810, (F. C.); Leven, March 8, 1814, (F. C.); M. of Abercorn, May 20, 1820, (F. C.)

R. M'KENZIE, W. S.—CAMPBELL & CLASON, W. S.—Agents.

DUKE of ROXBURGHE.—*Cranstoun*—*H. J. Robertson.*
J. WAUCHOPE.—*Fullerton.*
Competing.

No. 133.

Jan. 21, 1823.

SECOND DIVISION
Lord Cringletie.
M'K.

Clause—Royal Grant.—John, third Duke of Roxburghe, obtained from his late Majesty, a grant to him, 'his heirs and assignees, of the feu-duties, and 'other duties underwritten, payable to us by the

'said John, Duke of Roxburghe, furth of the lands 'and others after specified, (viz. the entailed estate 'of Roxburghe), for all years and terms bygone, rest-'ing unpaid, and yearly and termly, in time coming, 'during our pleasure,'—'with full power to the said 'John, Duke of Roxburghe, and his foresaid, to re-'tain in their own hands the said feu-duties, farms, 'and others after written, of all years and terms 'resting unpaid, and yearly and termly in time com-'ing, during our pleasure as aforesaid; and there-'upon to use and dispose at their pleasure.' Duke John in 1803 executed a disposition of 'all, and 'sundry lands, &c. annualrents, and other heritages, 'and heritable subjects whatsoever, now belonging, 'or which shall happen to belong to me at my decease, 'free and unlimited by any entail, and at my abso-'lute gift and disposal,' in favour of certain trustees, of whom Mr. Wauchope was the accepting and acting one. The Duke died in 1804, and the feu-duties, from the date of his decease, were levied and lodged in Exchequer, by order of the Barons, in a process between the present Duke, the heir of entail in the estates, and the Solicitor of Exchequer; in which the Barons found, that the grant did not come to an end by the death of Duke John, but only by the demise of his late Majesty in 1820. A multiplepoinding was thereafter raised, to ascertain who had right to the feu-duties between the period of the Duke's death in 1804, and that of the King's. Claims were lodged for the present Duke, and for Mr. Wauchope, as Duke John's trustee; the latter of whom contended, that the grant being to the heirs and assignees of Duke John, the right to the feu-duties was carried by his disposition in 1803. The Lord Ordinary,

holding, that the disposition was, from its terms, insufficient to carry the feu-duties, preferred the Duke to the fund in medio, and the Court adhered, in so far as his Lordship decerned in the preference.

In adhering to the interlocutor of the Lord Ordinary, the Court proceeded on the ground, that the grant was intended to confer a right of exemption from payment of the feu-duties, on the heir possessing the lands, during the life of the King; and that, even although the terms of the disposition had been broad enough, yet the Duke, who was the heir in possession, from 1804 till 1820, was entitled to be preferred.

M'Kenzie & Innes, W. S.—Tod & Romanes, W. S.—Agents.

A. Hamilton, Pursuer.—*Jeffrey—Hunter.*
Lindsay's Trustees, Defenders.—*Clerk—M'Farlan.*

No. 134.

Jan. 21, 1823.

Second Division.
Lord Cringletie.
F.

Reference to Oath.—This was a question regarding the import of an oath emitted by Lindsay, deceased, on a reference made in the present action at Hamilton's instance against him, for payment of a certain sum of money given by Hamilton to Lindsay, to retire a bill. Hamilton's allegation was, that the money had been given as a loan; while the counter averment was, that it had been absolutely paid over to retire the bill, in order to benefit Hamilton, in a contest for the office of trustee on a sequestrated estate. The Court held, that the oath did not prove that the money had been advanced in loan; and adhered to the Lord Ordinary's interlocutor assoilzieing the trustees.

Donaldson & Ramsay, W. S.—Tod & Wright, W. S.—Agents.

No. 135. PENTLAND and SONS, Pursuers.—*Solicitor-General Hope—Clerk—Cockburn.*
BELL and COMPANY, Defenders, et e contra.—*Forsyth.*

Jan. 23, 1823.
FIRST DIVISION.
Lord Alloway.
H.

Bill of Exchange—Proof.—This was the concluding part of the case noticed ante, Vol. I, No. 484. By an interlocutor there quoted, the Court, in respect of the suspicious nature of Pentland's books, and that he had failed to give a satisfactory account thereof, had allowed Bell and Company a proof prout de jure, that a bill accepted by them in favour of Pentland and Sons, and which was under reduction, was granted without value. On report of that proof, the Court reduced the bill. Against this judgment Pentland and Sons reclaimed, and maintained that the proof was incompetent, and that the allegation of no value could only be proved by writ or oath. The Court, however, adhered.

Pursuers Authorities.—Wallace, Nov. 29, 1793, (1494); Goodfellow, July 27, 1785, (1483); Wight, June 25, 1809, (F. C.)

W. DOUGLAS, W. S.—FORSYTH & MACDOUGALL,—Agents.

No. 136. J. W. JOHNSTONE, Petitioner.—*D. M'Farlane.*
J. BELL, Respondent.—*Bell.*

Jan. 23, 1823.
FIRST DIVISION.
D.

Writers Hypothec—Bankrupt.—The estates of M'Alpine having been sequestrated, Bell, a writer, ranked as a creditor. Being required by Johnstone, the trustee, to deliver up certain title-deeds belonging to the bankrupt, under reservation of his hypothec, he declined to do so, except on payment of his

account. But, on a petition by the trustee, the Court ordained Bell to give them up, reserving to him the full effect of his hypothec.

Respondent's Authorities.—Campbell, Feb. 1, 1817, (F. C.); Linning, June 27, 1821, (Ante, Vol. 1, No. 110); 2 Bell, 117.

GREIG & PEDDIE, W. S.—J. BLAIR, W. S.—Agents.

HON. T. DUNDAS, Pursuer.—*Clerk—Cranstoun—Spiers.*
LORD DUNDAS, Defender.—*Greenshields—Jardine.*

No. 137.

Jan. 23, 1823.

FIRST DIVISION.
Lord Meadowbank.
H.

Fee and Liferent—Tailzie—Service.—Sir Lawrence Dundas, on the occasion of the marriage of his son, (the late Lord Dundas), bound himself to dispone his whole estates in Scotland to him, 'for the 'liferent use of the rents, &c., after his own death, 'and in trust, quoad the fee and property thereof, 'for the use and behoof of the first, second, and third 'sons of the said marriage, and their respective heirs.' Accordingly, in 1768, he executed an entail, by which he disponed, after his death, to his son, in liferent, all his estates, 'and to the heirs-male lawfully 'procreate, or to be procreated of his body, in fee,' with a series of substitutions. The deed contained a procuratory of resignation, in virtue of which, Lord Dundas, after the death of his father, obtained, in 1787, a charter of resignation from the crown to himself, 'in vitali reditu, pro ejus usu vitalis redi-'tus tantum duran., omnibus diebus ejus naturalis 'vitæ, et heredibus masculis legitimis procreatis aut 'procreandis ex ejus corpore in feodo; quibus defici-'entibus,' &c. The precept of sasine was in precisely the same terms; but his infeftment was merely 'in

'vitali reditu, pro ejus usu vitalis reditus tantum, du-'ran. omnibus diebus ejus naturalis vitæ.' By the entail, each heir was bound to make up titles within two years from the time of the succession opening to him. Lord Dundas having died in 1820, his son, the defender, conceiving, that the part of the above precept, whereby sasine was ordered to be given to the heirs-male in fee was unexecuted, expede a general service in that character to his father, under the charter 1787, and was infeft. Doubts having arisen as to the validity of this title, an action of declarator was brought by the pursuer, as next heir of entail, who objected, that, by the charter in 1787, a fiduciary fee had been vested in Lord Dundas, and that his infeftment had exhausted the precept. The Court, on the report of the Lord Ordinary, sustained the title as valid, and assoilzied the defender.

Defender's Authorities.—Frogg, Nov. 25, 1735, (4262); Newlands, July 9, 1794, (4289); Waterston, Nov. 25, 1801, (4297); 2. Ersk. 1, 4; 1. Bell, 43; Macintosh, Jan. 28, 1812, (F. C.); 3. Ersk. 8, 7; 3. Ersk. 5, 8; Graham, July 4, 1759, (16931); Dalziel, March 11, 1756, (16204); Drummond, June 30, 1758, (16206); 3. Ersk. 8, 68.

H. G. Dickson, W. S.—J. Ker, W. S.—Agents.

No. 138.

A. Steele, Pursuer.—*Bell—Shaw.*
G. Young, Defender.—*Craigie—Burn Murdoch.*

Jan. 23, 1823.

Second Division. Lord Cringletie. M'K.

Fee and Liferent—Service—Frustra Petis, &c.—The late Peter Steele executed a disposition of certain heritable subjects, specially described, in favour of himself and wife, in conjunct fee and liferent, and his daughters Euphemia and Catherine nominatim in fee, and took infeftment thereon. After the special

disposition, and towards the conclusion of the deed, there was introduced a general disposition to his daughters nominatim in fee, share and share alike, 'of all and sundry lands, heritages, rooms, and pos-'sessions,' and effects whatsoever, of which he might die possessed, reserving his own liferent. On his death, and that of Catherine, Euphemia supposing, that, by the infeftment taken on her father's special disposition in favour of himself and children, the fee of the subjects had been vested in her and her sister, made up no titles to her father; and, thereafter, as in her own right, and as heir to her sister in her pro indiviso share, she executed, in favour of Young, a mortis causa disposition of the property, 'with all 'right, title, and interest' she had thereto. She subsequently obtained a precept of clare constat, on which she was infeft as heir to her sister; and, on her death, the pursuer, having served himself heir of conquest to Peter Steele, brought this action of reduction of the sasine on his disposition, in so far as infeftment was given to his daughters in fee;—of the precept of clare constat, and infeftment, in favour of Euphemia Steele; and of the disposition by her to Young; on the ground, that no right of fee was vested in the daughters by the disposition of Peter Steele, but merely a spes successionis; and that, therefore, Young's right proceeded a non habente potestatem

The Lord Ordinary assoilzied the defender, 'in 'respect that, although the deed by Peter Steele, 'in favour of his wife and children, contains a 'disposition of the particular subject afterwards 'conveyed by his daughter Euphemia to the de-'fender, and is in favour of himself and wife in 'conjunct fee and liferent, and his daughters, Ca-

'therine and Euphemia in fee, whereby the fee re-
'mained in him the granter; yet, as it also con-
'tains a general conveyance in favour of his wife
'in liferent, and his said two daughters in fee, of all
'and sundry lands and other subjects that should be-
'long to him at the time of his death, whereby they
'were the direct disponees to all such subjects as
'their father should die possessed of, and the subject
'in question is one of these; and Catherine and Eu-
'phemia Steele, the granter's children, having two
'titles under the foresaid disposition, were entitled to
'take the benefit of such of them as may be most ad-
'vantageous to them.' His Lordship afterwards stated, that he 'considered the second part of the disposition 'by Peter Steele to his daughters, to be a general 'disposition of his whole heritable and personal 'estate, of which he might die possessed, in favour 'of his two daughters nominatim, under the reser-'vation of his own liferent only, and a power of re-'vocation;'—that although he still retained the full right during his life, yet it did not thence follow, that if he did not revoke, the disposition was to have no effect after his death;—and that, although it was true, that 'the general disposition does not give a 'feudal right to the landed property; yet without 'service of any kind, it gives a right to the disponee 'to pursue the heir of the testator to make up titles, 'and convey feudally the estate to him, or to adjudge 'the estate in implement. And as this right was 'vested in Euphemia Steele by the general disposition 'in her favour, she conveyed the same right to her 'own disponee; and, therefore, as the defender can 'pursue the pursuer of this action to make up titles, 'and denude in his, the defender's favour, or can ad-

'judge in implement, the maxim applies, Frustra 'petis quod mox es restiturus.'—The Court adhered.

The Court thought, that there would have been considerable difficulty as to the share of the deceased sister, Catherine, had the pursuer been served heir to her, and the point been before them.

Pursuer's Authorities.—Dirleton, *voce* Fee; Dalrsey, Jan. 1663, (4256); Lindsay, Dec. 9, 1807, (Ap. Fiar, No. 1); Thomsons, Feb. 4, 1681, (4258); Frogg, Nov. 25, 1735, (4262); Lillie, Feb. 24, 1741, (4267); Ersk. iii, 8, 35, ii, 9, 42; 2. Stair, 3, 42; Cuthbertson, March 1, 1781, (4279); Porterfield, June 23, 1799, (4277); Baillie, Feb. 23, 1809, (F. C.)
Defender's Authorities.—M'Intosh, Jan. 28, 1812, (F. C.); Dykes, June 3, 1813, (F. C.)

J. Adams—J. Peddie, Junior, W. S.—Agents.

T. Kerr and Others, Advocators.—*Skene—Whigham.*
Sir H. D. Hamilton, Respondent.—*Murray—A. Wood.*

No. 139.

Jan. 23, 1823.

Second Division.
Lord Cringletie.
M'K.

Road.—This was a question of evidence.—Sir H. Hamilton having shut up a road on his property, Kerr, &c. farmers in the neighbourhood, petitioned the Sheriff to have it thrown open, alleging, that it was a public road. The Sheriff, having allowed a proof, dismissed the application.—Kerr, &c. advocated. The Lord Ordinary remitted simpliciter, and the Court, being satisfied that the proof established the road to be private, adhered.

Thos. Syme, W. S.—Russell, Anderson, & Tod, W. S.—Agents.

A. Mackenzie, Pursuer.—*Cranstoun—Hunter.*
R. Mackenzie, Defender.—*Cuninghame.*

No. 140.

Jan. 24, 1823.

First Division.
Lord Meadowbank.
D.

Title to Pursue—Process.—The pursuer was tenant of the defender, under a lease excluding assig-

nees and subtenants, which he conveyed to a trustee for behoof of his creditors. The defender then raised an action of removing against him, on the ground of desertion, by leaving the farm unstocked; and, thereafter, an action of irritancy, founded on the contravention of the condition of the lease. Having obtained decrees in these actions, he ejected the pursuer; and afterwards instituted another action, and got decree of removing, on the allegation, that the pursuer had run more than two years rent in arrear. Of the two first decrees, the pursuer brought an action of reduction and of damages, against which, the pursuer pleaded, that the last decree formed a title to exclude. The Lord Ordinary sustained the pursuer's title to insist in the reductive conclusions; but reserved the question of his title to pursue the declaratory conclusions, until after great avizandum had been made, and the conclusions of reduction disposed of under a remit from the Court. To this interlocutor the Court adhered.

Defender's Authority.—4. Ersk. 1, 20.

R. M'Kenzie, W. S.—R. Roy, W. S.—Agents.

T. Robertson, Petitioner.—*Bell*—*Cathcart.*

No. 141.

Jan. 24, 1828.

First Division. S.

Judicial Factor.—A ranking and sale having been brought, and a sequestration awarded of the estate of Kirkmichael, Robertson was appointed judicial factor. Finding that the tenants were unable to pay the rents in their leases, he, under the sanction of a meeting of the creditors, applied to the Court for authority to grant an abatement. At first their Lordships refused the prayer, 'reserving to the factor to 'act in the premises according to sound discretion,

'and the best advice which he may be able to ob-'tain.' But, on a reclaiming petition, and after having caused intimation to be made to all the creditors, they granted the prayer.

Petitioner's Authority.—Peddie, Dec. 13, 1822, (Ante, Vol. II, No. 83).

W. RENNY, W. S.—Agent.

J. KERR, (Trustee on TAYLOR'S Sequestrated Estate), Petitioner.—*Jameson.*
W. TAYLOR, Respondent.—*Jeffrey—Sandford.*

No. 142.

Jan. 24, 1823

FIRST DIVISION. S.

Bankrupt—Sequestration.—On the 11th of February 1819, the Court awarded sequestration, under the bankrupt act, of the estates of Taylor, on which Kerr was appointed and confirmed trustee. In the meanwhile, Taylor having prayed the Court to recal the sequestration, and this having, on the 22d May, been refused, he appealed to the House of Lords. The Sheriff then named the 29th July and 9th August for the examination of Taylor; and the trustee applied to the Court to fix a time for the election of commissioners. Taylor, who was in England, did not attend for examination, and, after opposition from him, the Court appointed the creditors to meet in order to choose commissioners on the 7th of January 1820. This order Taylor also appealed. The House of Lords having dismissed the first appeal, (by which the second necessarily fell), Kerr applied to the Court to authorize the Sheriff to fix new diets for Taylor's examination, & for the meeting of creditors to elect commissioners. This was opposed by Taylor, who alleged, that as the statute had enacted that these diets should take place at precise periods, which had

'ascertained to whom the tailzied fee of the property 'will belong, assoilzies her hoc statu from the claim 'of damages at the instance of the pursuer.' His Lordship afterwards explained, that 'the finding in 'this interlocutor respecting the construction of em- 'bankments, does not apply to maintaining such as 'have been already formed in a state of repair. It 'relates only to the formation of nova opera.' Both parties having reclaimed; the Court recalled 'the in- 'terlocutor of the Lord Ordinary reclaimed against, 'in so far as to find, 1. Respecting the woods, that 'the pursuer, Mr. Dickson, is entitled to cut wood 'on the property, under this limitation, that he shall 'not interfere, in doing so, with the amenity or 'shelter of the estate; and that Mrs. Douglas Dick- 'son, the liferenter, is entitled to cut such coppice- 'wood as has been in the use of being felled; and 'also to cut, at the sight of Mr. Dickson, the fiar, 'such grown timber as is required for repairing 'fences and other purposes of the estate; 2. In re- 'spect to mines, minerals, and quarries, find, that 'Mr Dickson, the fiar, is entitled to work the same, 'he always paying surface damages, and having re- 'gard to the amenity of the manor-house and es- 'tate. And that the liferenter is, on the other hand, 'entitled to have such lime-stones and other miner- 'als, as shall be required for the purposes of the es- 'tate; 3. Find, that the liferenter, Mrs. Douglas 'Dickson, is not bound to be at the expence of erect- 'ing any embankments upon the Clyde;' and, lastly, their Lordships remitted to the Lord Ordinary to inquire into the question of damages, and to do as he should see just.

Pursuer's Authorities.—(1.)—2. Craig, 8, 8 and 9; 2. St. 3, 74; 2. St. 2, 1;

1. Bankt. 665; 2. Erak. 9, 56, 57, and 58; Lang, Dec. 25, 1752, (8246); Borthwick, July 3, 1696, (8245); Belcher, June 30, 1779, (15663); Ferguson, July 26, 1737, (8254); Duke of Roxburghe, Jan. 19, 1816, (F. C.).—(3.)—1491, c. 25; 1535, c. 15; 7. Voet, 1, 36 and 37.—(4.)—2. Erak. 9, 59; 4. St. 20, 23; 1. Blackst. 121 and 280; Kames Ess. on B. Antiq. No. 1; 2. Blackst. 283; 3. Woodeson's Vin. Lect. 400.

Defender's Authorities.—(1.)—1. Voet, 7, 22.; 2. St. 6, 11; 2. St. 3, 24; 2. Erak. 9, 59; 1. Bankt. 658, § 6; Ferguson, July 26, 1737, (8254); Duke of Roxburghe, Jan. 19, 1816, (F. C.)—(4.)—2. Erak. 9, 59.

GIBSON & OLIPHANT, W. S.—W. DOUGLAS, W. S.—Agents.

R. YUILLE and Others, Advocators.—*Skene—Brown.* No. 144.
D. LAWRIE and G. DOUGLAS, Respondents.—*Cranstoun—Jameson.*

Jan. 24, 1823.

SECOND DIVISION.
Lord Cringletie.
F.

Superior's Hypothec for feu-duties in Urban Tenements.—Herbertsons were vassals in certain urban tenements, (consisting chiefly of a wood-yard, workshops, and dwelling-house), held of the respondent, Lawrie, for payment of a feu-duty of £276. This was payable, not only as a return for the subjects conveyed to them, but also 'in consideration of the 'sum of £1,990, instantly advanced and paid to them, 'by the said David Lawrie.' Herbertsons were sequestrated in August 1819, at which period there was on the premises a considerable quantity of wood and materials, for repairing the wright-work of houses which they were engaged by contract to finish; and particularly of several houses belonging to Yuille and others, who, anxious to have their houses completed, purchased from the trustee these materials, and also the working-tools and furniture belonging to the bankrupts. Yuille, &c. paid the price, and entered into possession of the premises, and the Herbertsons, as employed by them, (with consent of the creditors), conti-

nued to prepare the materials, which were, by degrees, taken away, and before Whitsunday 1820, the whole stock, furniture, &c. had been removed from the premises. Lawrie, the superior, now applied to the Sheriff, for warrant to bring back and sell the effects so removed, on the ground that they were subject to his right of hypothec, for the feu-duties which had fallen due at Whitsunday. The warrant was granted, and the respondent, Douglas, having paid the feu-duties to the superior, and received an assignation of his right of hypothec, proceeded to carry it into execution. On this, Yuille, &c. prayed the Sheriff for an interdict, which was refused; and the cause having been brought into this Court by advocation, the Lord Ordinary remitted simpliciter. Yuille, &c. petitioned and pleaded,—1. That a superior has no hypothec for his feu-duties over invecta et illata in an urban tenement; 2. That the duties in this case were not proper feu-duties, but a return, partly for money sunk on an heritable security; and, 3. That, at any rate, they having made a fair bona fide purchase of the effects, and removed them before any sequestration was used by the superior, had a title preferable to his right of hypothec. The respondents, besides combating these pleas in law, maintained, that the advocators having entered into possession of the premises, had thereby rendered themselves liable for the feu-duties. The Court adhered, reserving certain alleged claims of compensation.

One of the Judges expressed some doubts, on account of the nature of the feu-duties; but all of their Lordships were agreed, that the superior in urban tenements possessed a right of hypothec over the invecta

et illata, which could not be defeated by a sale, such as occurred in the present case.

Advocators Authorities.—(1.)—2. Ross, 392–402; 2. Bell, 31.—(2.)—Trustee for Falside's Heirs, March 4, 1815, (F. C.)—(3.)—2. Erak. 6, 64.
Respondents Authorities.—(1.)—1. Craig. 10, 38; Balf. 126; 2. M'Kenzie, 5, 12, & 6, 63.

JAS. CRAUFORD, W. S.—D. BROWN, W. S.—Agents.

J. TAYLOR and SONS, Suspenders.—*Moncreiff—Skene.* W. TAYLOR, Charger.—*Jeffrey—Clephane.* No. 145.

Jan. 25, 1823.

FIRST DIVISION. Bill-Chamber. Lord Mackenzie.

Society—Interdict.—Prior to 1814, W. Taylor was a partner of the company of J. Taylor and Sons, merchants in Ayr; but, in that year, an agreement was made, by which he assigned all right and interest he had to the other partners, on certain conditions, declaring, that if they were not performed within a certain time, 'the before written assignment by the 'said W. Taylor, of his share of the Ayr Company, 'shall become void; and the said W. Taylor shall be 'reinstated in his said share of the Ayr Company, and 'whole profits that may arise thereon.' Notice was publicly given that he had ceased to be a partner; and, in 1819, his estates were sequestrated under the bankrupt act. In the course of 1821 and 1822, he, on the allegation, that the conditions of the agreement had not been performed, and assuming the character of a partner, accepted bills to a large amount, signed with the social firm, and advertised that he would sell a promissory-note of the company for £250 weekly by auction. Against these proceedings, Taylor and Sons presented a bill of suspension and interdict, on the ground, 1. That by the deed of agreement, W. Taylor was divested;—that the conditions

had been implemented;—and that, if this were disputed, he could be reinstated only by a decree of declarator; and, 2. That, by the contract of copartnery, the bankruptcy, or the granting of obligations by a partner in name of the Company for his private use, extinguished his right. The Court, on report of the Lord Ordinary, passed the bill without caution or consignation, and granted the interdict.

Suspenders Authority.—2. Bell, 644.

J. BURNETT, W. S.—A. FLETCHER, W. S.—Agents.

No. 146.

A. & W. MALCOLMS, Suspenders.—*Jameson.*
T. YOUNG, Charger.—*Tait.*

Jan. 25, 1823.

SECOND DIVISION. Bill-Chamber. Lord Kinedder. F.

Lease, Assignation of.—Malcolm, in the year 1809, assigned, in security of money advanced, a long lease of certain subjects to Montgomerie, who again assigned the same to the suspenders, (who were sons of Malcolm), on receiving from them payment of the money advanced. The suspenders, it was alleged, got possession, and paid the rents to the landlord. Old Malcolm was also tenant of a farm, for the rent of which he had fallen into arrear. Young was factor for the landlord, to whom he had paid up the rents, without any deduction for arrears, for which, as he stated, he was liable, by his agreement with the landlord. Malcolm granted Young his bill for the arrears, on which, after some time, Young raised diligence; but, not receiving payment, he, in 1818, led an adjudication of the long lease above mentioned, against old Malcolm, and obtained decree. He thereafter raised action of reduction of the assignation to Malcolms, the sons, in which (their case being ill attended to)

decreet of certification contra non producta was pronounced; and, on this, he applied for, and obtained warrant from the Sheriff, for removing the Malcolms from the premises. The latter having, in the meantime, been placed on the poor's roll, and instituted a reduction of the certification, presented a bill of suspension, without caution, which the Lord Ordinary refused. The Court remitted to pass on caution being found for expences, and for the rents fallen due since the date of decreet of certification, and which might become due in future.

MACK & WOTHERSPOON, W. S.—TAIT, YOUNG, & LAWRIE, W. S. —Agents.

JON. & JAS. MURDOCH, Advocators.—*Brownlee.* No. 147.
W. CARSTAIRS, Respondent.—*Cranstoun—J. Henderson, Junior.*

Jan. 25, 1823.

SECOND DIVISION. Bill-Chamber. Lord Bannatyne. F.

Servitude.——Brown of Newhall possessed the lands of Nethermoss-houses, in the titles to which was included 'the privilege of casting peats, both for 'fuel and for sale,' in Walltower Moss, the property of Carstairs. A long lease of a small portion of these lands was granted by Brown to Murdochs, with liberty to them to cast peats in the Walltower Moss, both for fuel and sale, 'provided his rights authorize 'him to grant this liberty.' Murdochs having commenced casting peats, Carstairs applied to the Sheriff for an interdict against them, on the ground, that although the proprietor or his tenant might exercise singly the right of casting peats for feul and sale, yet both were not entitled to do so, nor was the proprietor entitled to communicate this privilege to more than one tenant. The Sheriff granted the

interdict. Murdochs advocated, and the Lord Ordinary remitted, 'with instructions to recal the interdict, and appoint the parties to lodge mutual condescendences, the complainers as to the possession hitherto had on the right of servitude claimed by them, and the respondent as to any abuse he shall allege to have been committed in the exercise of that right.' The Court, (considering that the Lord Ordinary had decided nothing as to the rights of the parties, but merely appointed an investigation), adhered to this interlocutor.

PETER COUPER, W. S.—JAS. GILLON,—Agents.

No. 148.

A. and D. SCOTT, Petitioners.—*Robertson.*

Jan. 28, 1823.

FIRST DIVISION.
D.

Jurisdiction—Curator Bonis.—Mr. Scott, who was illegitimate, died intestate, leaving two natural children. An application having been made to the Barons of Exchequer, for a gift of his property to his children, a petition was presented to the Court to appoint, in the meanwhile, a curator bonis. On the Court, however, indicating an intention to refuse the petition, as competent in Exchequer only, it was withdrawn.

D. CAMERON, W. S.—Agent.

No. 149.

ROBERT GRAY and COMPANY, Suspenders.—*Jeffrey —Fullerton.*

J. FARQUHAR, Charger.—*Moncreiff—Jameson.*

Jan. 28, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Reputed Ownership.—Gray and Company, on the dependence of an action before the water bailie of

Clyde, against Morris and Sons, for the price of coals, arrested, as their property, a vessel lying at Glasgow. Immediately thereupon, Farquhar intimated to Gray and Company, that he was the true owner of the vessel, shewing his certificate of registry. On their refusing to relieve the vessel, he applied to the water bailie for demurrage. Gray and Company having made a reference to Farquhar's oath, he deponed, that the vessel had originally belonged to Morris, but that, on his bankruptcy, she was purchased by Morris and Sons, for his behoof, at a public sale, and he obtained a regular vendition and certificate of registry in his own name; that he had engaged to reconvey her to Morris on his repaying the purchase-money, and that he had allowed Morris and Sons, (a company formed by Morris with his sons, subsequent to his bankruptcy), to have the management of the vessel, which they continued to have, down to the date of the arrestment. The water bailie found Farquhar entitled to demurrage. Gray and Company suspended, and pleaded, that there had been no proper transference of the vessel, and that, at all events, she was liable for the debts of Morris and Sons, on the ground of reputed ownership. On the other hand, it was maintained,—1. That the possession had been truly held by Farquhar; for, after having purchased her by a regular vendition, he had appointed the master, and Morris and Sons had possessed only as his agents; 2. That, at any rate, the reputed ownership could not make the vessel liable for any debts, except for furnishings to her; and, 3. That the action, on the dependence of which arrestment was used, was incompetent before the

water bailie, not being for a debt of a maritime nature. The Lord Ordinary repelled the reasons of suspension, and the Court adhered.

Suspenders' Authorities.—1. Bell, 87, 88, 183, 185, 188; Creditors of Hamilton, Jan. 11, 1682, (902 & 1064).

GEORGE DUNLOP, W. S.—DAVID GREIG, W. S.—Agents.

No. 150. W. SYMINGTON, Pursuer.—*Moncreiff—Cuninghame.* DUKE of QUEENSBERRY'S Executors, Defenders.—*Cranstoun—Murray.*

Jan. 29, 1823.

FIRST DIVISION. Lord Alloway. S.

Warrandice—Lis Alibi—The late Duke of Queensberry, in 1807, granted to Symington a lease of the farm of Edstown, part of the entailed estate of Niedpath on a grassum, and bound himself 'to 'warrant this lease to be good, valid, and effectual 'to the said Robert Symington, and his foresaids, at 'all hands, and against all mortals, as law will, and 'that to the extent of the full period of thirty-one 'years from the aforesaid term of Whitsunday 1807, 'in case the Duke has power, by the said entail, to 'grant a lease of that endurance; and in case it 'should be found, that his Grace has not power,' then for an alternative period, from twenty-nine to nineteen years, as should be ultimately determined, and to make up any loss thence ensuing. This lease, among others, was reduced, as having, contrary to the entail, been let with diminution of the rental. An action was then brought on the warrandice by the pursuer, son and heir of R. Symington, for reparation of the loss sustained by the reduction of the lease, and for relief against certain claims which were in consequence made against him. In defence, the executors pleaded, 1. That the pursuer had entered a claim

in Chancery in England, for these damages, on a fund belonging to the late Duke, which, they alleged, formed a lis alibi pendens; 2. That the warrandice related solely to the endurance;—that the Duke did not warrant its validity against the objection on which it had been set aside;—and that, although the pursuer might have a claim for repetition of part of the grassum, yet he had none for the damages sued for; and, 3. That as the statute 1685, c. 22, empowers parties to make laws for the entailing of their estates, and as it has been held, that all leases on grassums are null and void, so there could be no effectual warrandice of that which was in law a nullity. The Lord Ordinary found, 'Imo, With regard to the 'plea of lis alibi pendens in the Court of Chancery, 'That this cannot be a bar to the present proceed-'ings, seeing, 1st, That the claim made in the Court 'of Chancery by the pursuer and the other tenants, 'was lodged in consequence of advertisements in 'the newspapers, desiring all parties who had any 'claims against the late Duke of Queensberry to 'lodge the same with the Master, and was done sole-'ly with the view of acquainting the Master with the 'amount of the existing claims, so as to limit the 'sums to be paid to legatees, or those in right of the 'reversionary interest, to the surplus of the estate be-'yond these claims; 2dly, That this claim arises out 'of a clause of absolute warrandice contained in a 'contract with regard to heritable subjects in Scot-'land, and which must be constituted in Scotland 'before the claim could receive effect in the Court 'of Chancery; and, 3dly, That the respondent claims 'his relief, not only from the heritable and moveable 'estate of the late Duke of Queensberry situated

'in Scotland, but also from Mr. Tait, as his cautioner, upon the same warrandice; and payment from the Duke's heritable subjects, or from Mr. Tait's subjects, all of which are situated in this country, cannot be obtained without a decree pronounced by the Courts here. With regard to the second plea, finds, that, by the clause in question, the Duke of Queensberry, for whom the defenders act as trustees and executors, granted the most absolute and effectual obligation of warrandice known in the law of Scotland, upon which the pursuer, on the lease being evicted from him through any defect in the right, was entitled to claim relief from any estate or property held by the late Duke, and liable for payment of his debts and obligations. And, with regard to the third plea, finds, that there is nothing in the statute 1685 which can prevent the operation of a clause of warrandice granted in a lease by an heir of entail, affecting any of his other property not entailed, or which can prevent the person, whose right under that lease has been evicted, from claiming relief, either from any separate estate belonging to the granter of the obligation of warrandice, or from the cautioner for that warrandice, provided it does not affect the heirs of entail nor the entailed estate;' and, therefore, decerned in terms of the libel. The Court refused a petition, without answers.*

J. Tweedie, W. S.—Lamont & Newton, W. S.—Agents.

* Leave to appeal this case was subsequently given.

R. DOWIE, Suspender.—*Brownlee.* No. 151.
J. CRAIG, Charger.—*Moncreiff—J. Henderson, Junior.*

Jan. 29, 1823.

FIRST DIVISION
Bill-Chamber.
Lord Mackenzie.

Jurisdiction of Admiral-Depute—Bankrupt.—Craig having charged Dowie on a decree of the admiral-depute of Leith, the latter presented a bill of suspension, on the ground, 1. That the decree was in absence; 2. That as the action had been raised on a bill of exchange, and the admiral-depute had no jurisdiction in mercantile cases, the decree was incompetent; and, 3. That he had since obtained a general discharge, under a sequestration, on payment of certain debts, among which that of Craig was not included. The Court, on the report of the Lord Ordinary, passed the bill without caution; but, on a petition, altered, and remitted to his Lordship to pass only on caution.

Suspender's Authorities.—(2.)—Miller, June 7, 1759, (7514); Haig, Deas, and Company, July 16, 1768, (7515); 1. Ersk. 3, 34.
Charger's Authorities.—(2.)—Craig, March 3, 1772, (7518).—(3.)—2. Bell, 484–487–497.

G. LANG—R. BURN, W. S.—Agents.

P. SCOTT, Suspender.—*Cuninghame.* No. 152.
T. GILLESPIE and MANDATORY, Chargers.—*Blackwell—J. Dalzel.*

Jan. 29, 1823.

SECOND DIVISION.
Lord Pitmilly.
B.

Mandatory in an Action.—Gillespie, a mariner, who had been born in Jamaica, but had resided the greater part of his life in this country, and whose family was domiciled in Greenock, obtained a decreet before the Sheriff in an action at his instance against Scott. Scott suspended; and Gillespie having sailed on a voyage

pending the litigation, it was objected by Scott, that the mandatory appointed by Gillespie, (M'Kellar, a carpenter), was not in such circumstances as to be considered responsible for payment of expences, should he succeed. The Lord Ordinary, 'in respect 'the charger has failed to produce a mandate to a suf-'ficient mandatory,' suspended the letters. But the Court, (holding that Gillespie was a British subject, and domiciled in this country), 'in respect that the 'charger is not alleged to be absent animo remanen-'di, nor that the mandatory is bankrupt,' altered the interlocutor, and remitted to proceed accordingly.

The Court were unanimously of opinion, that a party was not bound to find a cautioner for the expences; and that, therefore, it was quite sufficient if the mandatory was in the same condition of life with the party. They also held, that mariners and others who had their domicile in this country, but were necessarily obliged to be often absent from it, were not bound to grant a new mandate on each occasion of leaving this country.

Suspender's Authorities.—1. Erak. 2, 21; Heron, Dec. 16, 1773, (8550); Hamilton, May 18, 1822, (Ante, Vol. I, No. 477).

Charger's Authorities.—1. Erak. 2, 16; 1. Ivory, 163; Fraser, June 21, 1821, (Ante, Vol. I, No. 96); Leigh, Dec. 19, 1792, (4645).

GREIG & PEDDIE, W. S.—W. DRYSDALE, W. S.—Agents.

A. DUNLOP.—*Cuninghame.*
MRS. J. WEIR, &c.—*Macdonald.*
Competing.

No. 153.

Jan. 29, 1823.

SECOND DIVISION.
Lord Pitmilly.
F.

Arrestment.—In a multiplepoinding, raised in the name of the executrix of Peat, claims were lodged by three creditors of the deceased; and, considerably more than six months after Peat's death, decree was pronounced, preferring them to the fund in medio. Dunlop, another creditor of the deceased, gave in a representation, and, for the first time, claimed to be ranked pari passu. This was opposed by Weir, &c. on the ground, that they were preferable creditors, in virtue of arrestments used on the funds in medio, in the hands of the factors employed by the executrix to collect the same. The Lord Ordinary refused the representation, and the Court adhered.

Dunlop's Authorities.—3. Erak. 9, 45; 2. Bell, 78–80; Russel v. Simes, Bell's Cases, 217; Innes v. Russel, May 16, 1794, Bell, 8.
Weir's Authorities.—3. Stair, 8, 68; 3. Erak, ix, 44–5–6, and vi, 18; 2. Bell, 78–79–80.

JOHN TWEEDIE, W. S.—D. WATSON,—Agents.

J. TELFER and COMPANY, Pursuers.—*Jameson.*
J. BELL, Defender.—*Skene—Brownlee.*

No. 154.

Jan. 31, 1823.

FIRST DIVISION.
Lord Alloway.
D.

Submission——Arbiter.——Telfer and Company, and Bell, submitted certain disputes to the decision of arbiters, 'with power to them, in case of variance of opi-
' nion, to choose an umpire or oversman,' who should, in that event, decide. The arbiters differed on one point, as to which an appeal was made to the opinion

of a third party. He assumed the character of oversman, and pronounced a decreet-arbitral, which did not exhaust the matter at issue. Of this decreet, Telfer and Company raised a reduction, on the ground, chiefly, that there had been no devolution, and that, therefore, the decree was unauthorized. The Lord Ordinary decerned, in terms of the libel, in respect that, 'in the extract of the submission and 'decreet-arbitral produced, there is no devolution 'upon the oversman subscribed by the parties; nor 'does it appear, from said extract, that the oversman 'had any authority to act, although the decreet is 'pronounced solely by him.' The Court refused a petition, without answers.

DONALDSON & RAMSAY, W. S.—T. MEGGET, W. S.—Agents.

No. 155.

W. M'MILLAN, Suspender.—*Marshall.*
J. and J. MILLER, Chargers.—*Gillies.*

Jan. 31, 1823.

FIRST DIVISION. Lord Meadowbank. S.

In this case no general point was decided. It was a charge on a decree for payment of a writer's account, which was resisted on various grounds; but chiefly on an allegation, that letters of horning and caption, belonging to the suspender, had been lost by the chargers. Of this, however, no evidence existed. The Lord Ordinary, in part suspended the letters, and, in part, found them orderly proceeded. The Court, on mutual petitions, adhered.

LINING & NIVEN, W. S.—W. SPALDING,—Agents.

D. G. FORBES, Pursuer.—*Cranstoun—Jeffrey—Buchanan.*
C. ALISON and D. LEDINGHAM, Defenders.—*Moncreiff—Cockburn—Jameson.*

No. 156.

Jan. 31, 1823.

FIRST DIVISION. Lords Gillies and Meadowbank. D.

Reparation—Personal Diligence—Jury Court.— Alison raised diligence on a bill granted by Forbes, and transmitted it to Ledingham, with instructions to recover payment. The latter put it into the hands of M'Bean, a messenger, who apprehended Forbes, and, instead of carrying him to jail, detained him at an ale-house, at his own request, till measures were taken for his liberation. Forbes's agent, M'Intosh, consigned the money with a magistrate, under condition, that 'the money was to be paid upon the 'creditor's executing and delivering an assignation 'of the debt to the said Campbell M'Intosh, to be 'made out by him at his own or the creditor's ex-'pence.' This condition, it was alleged, was inserted in consequence of an agreement made with Ledingham to that effect. The latter refused to accept of the money on these terms, and afterwards, of his own accord, liberated Forbes. An action of oppression and damages was then raised by Forbes against Alison, Ledingham, and M'Bean, for illegal imprisonment. The Lord Ordinary, after allowing issues to be framed, reported them to the Court, who assoilzied M'Bean; approved of them so far as regarded Alison and Ledingham; and remitted to the Lord Ordinary to send them to the Jury Court; but, afterwards, explained 'that no judgment has been given 'by the Court upon the question of relevancy; and 'that the defenders are not barred from arguing such

'questions before the Jury Court, or that Court from 'disposing of the same, as to them shall seem just. The issues were,—

'1. Whether the pursuer was arrested on the 8th 'day of April 1817, by the defender, John M'Bean, 'acting under the instructions of the defender, John 'Ledingham, by instructions from the other defend- 'er, Colin Alison, for payment of a debt said to be 'due to the said defender, Alison, and detained for 'many hours at an ale-house at Milntown of Cul- 'loden by the said defenders, or one or other of 'them, instead of being taken to jail, to the damage 'and injury of the said pursuer?

'2. Whether, after the pursuer had been arrested 'as aforesaid, consignation of the debt said to be 'due to the said defender, Alison, was made in the 'pursuer's behalf, in the hands of Alexander Ander- 'son, one of the magistrates of Inverness, and a re- 'ceipt for the money consigned immediately there- 'after exhibited and tendered to the said defender, 'Ledingham, with a requisition to give immediate 'directions for the pursuer's release from the arrest 'aforesaid; and, whether the said defender, Leding- 'ham, did refuse to accept of said receipt, or to li- 'berate the pursuer, to the damage and injury of 'said pursuer?

'3. Whether, upon the 8th day of April fore- 'said, after the pursuer had been arrested as afore- 'said, the said defender, Ledingham, did agree that 'the pursuer should be liberated upon consignation 'of the money in the hands of Alexander Anderson, 'aforesaid, to be paid on an assignation being grant- 'ed to the debt; and whether the said defender did 'fail to implement said agreement, to the damage 'and injury of said pursuer?'

The Jury Court having retransmitted the case in order that the relevancy might be decided, the Lord Ordinary found, 'As to the matters contained in the 'first issue, that the messenger, who was alone, or 'chiefly, responsible for the alleged undue detention 'of the pursuer in the ale-house, has been assoilzied 'by the final judgment of the Court: Finds, there-'fore, that the pursuer's allegations upon this point, 'which have been thus finally decided to be irrele-'vant as to the messenger, can still less afford a re-'levant ground of action against the other defend-'ers. As to the matters contained in the second is-'sue, Finds, that the pursuer would have been en-'titled to his immediate liberation, if, upon being 'presented to the jailor, he had made due consigna-'tion in the magistrate's hands: Finds, that libera-'tion, so granted to a debtor, is the act of the ma-'gistrate in whose hands consignation is made; and 'who alone is entitled to judge of it, or bound to 'act in consequence of it, and that the messenger 'and agent of the incarcerating creditor, are no pro-'per parties to such proceedings; and finds, that the 'defender, Ledingham, was not bound to authorize 'or direct the messenger to set the pursuer at li-'berty from arrest, before incarceration, or presenta-'tion to the jailor, in consequence of the consigna-'tion which is alleged to have been made in this 'case: Finds, therefore, that the allegations of the 'pursuer, which form the subject-matter of the se-'cond issue, are not relevant. As to the matter 'contained in the third issue, Finds, that though it 'appears to the Lord Ordinary that the agreement 'therein mentioned, and which is not said to have 'been reduced into writing at the time, cannot be

'proved by parole evidence; and, though it further 'appears doubtful, how far the pursuer can qualify 'any damage from the alleged breach of said agree-'ment, by Ledingham declining to authorize his li-'beration upon consignation, seeing that, on being 'carried to jail, and presented to the jailor, he was 'entitled, on making due consignation, to his imme-'diate liberation, without Ledingham's authority or 'consent, yet the pursuer's allegations respecting 'said agreement, and the alleged breach of it, by 'Ledingham, are relevant: Therefore, in so far as 'regards the matters contained in the third issue 'aforesaid, finds, that it forms a fit subject for trial in 'the Jury Court; quoad ultra sustains the defences 'for Ledingham, and assoilzies him from the action, 'and decerns; and, in respect none of the other de-'fenders are alleged to have been parties to the 'agreement above mentioned, sustains their defences, 'and assoilzies them from the haill conclusions of the 'action.' Against this judgment both Forbes and Ledingham reclaimed; the former maintaining, that, on the merits, it was erroneous, and that, at all events, it was incompetent, as, 1. It altered the previous interlocutor of the Court, remitting the case to the Jury Court; and, 2. That, as the action had been brought when the 35. Geo. III, c. 42, was in operation, his Lordship ought, on its return from the Jury Court, to have laid it before the Court. To this it was answered, that, at the date of the remit, that statute was at an end, and that the 59. Geo. III, c. 35, was the governing rule, and that, in the proceedings, it had been duly observed. The Court refused Forbes's petition; and assoilzied Ledingham entirely.

Pursuer's Authorities.—(1. Issue),—2. St. 9, 5; 1. St. 9. 5; Anderson, Jan. 3,

1750, (13949); Leslie, Nov. 18, 1761, (11749); Wood, Nov. 28, 1710, (13962); (2. Issue),—Stewart, July 6, 1784, (13989); 3. Erak. 5, 11; Erskine, Jan. 14, 1780, (1386).

Defenders Authorities.—(1. Issue),—Stewart, July 6, 1784, (13989); 4. Erak. 3. 15.—(2. Issue),—3. Erak. 5, 11; Gardiner, Nov. 19, 1671, (3385).

H. M'QUEEN, W. S.—BROWN & LAWSON, W. S.—R. LOCKHART, —Agents.

R. Ross, Advocator.—*Jeffrey—J. Henderson, Junior.* J. TAYLOR and COMPANY, Respondents.—*Cuninghame.*

No. 157.

Jan. 31, 1823.

SECOND DIVISION. Lord Pitmilly. B.

Sale—Principal and Agent.—In an action before the Magistrates of Glasgow, at the instance of Ross, for payment of the price of a quantity of oranges, Taylor and Company pleaded in defence, that the oranges were in such bad condition when delivered, that they had been refused, but had afterwards been received on an agreement that they were to sell them for what they would bring for behoof of Ross. The Magistrates allowed a proof; on considering which, they found 'that matters must be arranged 'between the parties, upon the footing, not of the 'contract of sale, but of the contract of principal 'and agent, and, upon this footing, appoint the de-'fenders to give in a state of the accounts between 'the parties, giving the pursuer credit for the pro-'ceeds of all the oranges received by them.' The state having been given in, the Magistrates decerned against Taylor and Company for the proceeds of the oranges; but assoilzied them quoad ultra. Ross advocated; but, the Lord Ordinary and the Court being satisfied that the Magistrates' construction of the proof was correct, remitted simpliciter.

GAVIN MACDOWALL—GREIG & PEDDIE, W. S.—Agents.

No. 158. A. M'NEIL and Others, Pursuers.—*Fullerton—Maitland.*

A. BLAIR, Defender.—*Baird—Marshall.*

Jan. 31, 1823.

SECOND DIVISION. Lord Cringletie. M'K.

Bill of Exchange—Sexennial Prescription.—The late Mr. Hannay appointed Ross and Jeffrey his trustees; and part of the trust-estate having been lent to Jeffrey, Ross drew a bill, dated 20th August 1813, on him for the amount, which he, along with Blair, accepted. Ross died, and Jeffrey, the only surviving trustee, became bankrupt, previous to the expiry of six years from the date of the bill. A conveyance of the trust-funds was some time thereafter executed by Ross's executor, by Jeffrey, and by all parties having any interest therein, in favour of M'Neil and others, as new trustees. After the lapse of six years from the term of payment of the bill, these trustees raised action against Blair for payment. He pleaded, in defence, the sexennial prescription, and alleged that he was only a cautioner.

It was answered for the trustees, 1, That, during the period of prescription, there were no parties who had an interest in the fund valentes agere, as the legatees, for whose behoof the funds were held in trust, were minors; and the trust had, in the meanwhile, lapsed by the death of one trustee, and the bankruptcy of the other, who was also debtor in the bill; and, 2. That Jeffrey had, after the six years, acknowledged himself still indebted for the sum in the bill, which must be held to prove resting owing against his co-obligant Blair, as well as himself. The Lord Ordinary 'sustained the plea of prescription, reserving to

'the pursuers, to prove resting owing, in terms of 'the act of parliament;' and the Court adhered.

The Judges held, 1. That there was here no proper non valentia under the act 1772, c. 72, the exception in which applies to the case of minors only, as Ross was personally the creditor in the bill, and his executor was entitled to have sued on it; and, at any rate, the same measures might have been taken within the six years, as those under which the present action was raised; and, 2. That Jeffrey's acknowledgment could not affect Blair.

Pursuers Authorities.—(1.)—Young, Jan. 7, 1672, (11207); Brown, Feb. 5, 1680, (11209); Elliot, Feb. 18, 1724, (11209); M'Dowall, Nov. 20, 1785, (7455); Gordon, Dec. 1, 1757, (11161).—(2.)—Gordon, Nov. 23, 1784, (11127).
Defender's Authority.—(2.)—Houstoun, May 31, 1822, (Ante, vol. I, No. 504); 1772, c. 72.

J. H. Ross, W. S.—A. Blair, W. S.—Agents.

Tod and Wright, W. S. Pursuers.—*M'Farlan—Cranstoun.*
T. Brydone, and R. Armstrong, Defenders.—*Jeffrey—Skene.*

No. 159.

Jan. 31, 1823.

Second Division. Lord Pitmilly. M'K.

Implied Obligation.—Tod and Wright pursued the defenders, creditors of Mrs. Haldane, for the expences of applying for a sequestration of her estate under the bankrupt act, which was afterwards recalled. They pleaded, in defence, that they had not authorized or acquiesced in the proceedings. Brydone had attended a meeting of creditors, held for the purpose of choosing an interim factor under the sequestration; and Armstrong had also been present, (although his name was not marked in the minutes), and the names of both were subscribed to a letter, recommending that a personal protec-

tion should be granted to Mrs. Haldane. Armstrong, however, alleged, that his signature was forged. The Lord Ordinary decerned against them; and the Court, after ordaining Brydone to confess or deny that his name had been adhibited by his brother, under his authority, which he failed to do, adhered.

TOD & WRIGHT, W. S.—THO. SYME, W. S.—Agents.

No. 160.

W. BUSBY, Petitioner.—*Baird.*

Feb. 1, 1823.

FIRST DIVISION. D.

Factor—Jurisdiction.—Mrs. Busby having left her estate to trustees, the petitioner, as the only surviving one, applied to the Court to name a factor, and to grant power to make up titles to an heritable debt and certain other heritable subjects. The Court named a factor; but, before conferring the powers required, ordained the petitioner to give in a minute, 'pointing out the decided cases where the Court 'granted the special power and authority craved in 'the petition;' and this having been done, they granted the prayer.

Petitioner's Authorities.—A. v. B. July 1736, (Elchies, No. 6, Tutor); Baird, Jan. 13, 1741, (16346); Riddel, Nov. 11, 1746, (16350); Anstruther, March 3, 1818, (F. C.); Home, March 7, 1793, (16382); 4. St. 3, 1; 4. Bankt. 7, 24; 1. Ersk, 3, 22 and 23.

WALKER, RICHARDSON, & MELVILLE, W. S.—Agents.

No. 161.

J. DIXON, Suspender.—*Forsyth.*
J. LAWTHER, Charger.—*Sandford.*

Feb. 1, 1823.

FIRST DIVISION. Bill-Chamber. Lord Mackenzie. H.

Burgh—Sasine—Registration.—By the charter of the burgh of Dumbarton, the tenure is declared to be 'in feudi firma hereditate et libero burgagio;' and

the reddendo, 'sūmā decim mcarum monete Scotie 'tanqūa feudifirma devoriū. suprascript. cum servitio 'liberi burgi vsitat. et consuet.' The magistrates granted a charter of novodamus to Lawther of a piece of ground lying within the territory of the burgh, to be holden of them, 'for payment of the feu-duty, and 'performance of the prestations under written, viz. 'the sum of twelve shillings Scots, in name of feu-'duty, &c., and bearing with the said magistrates and 'town-council, and their successors in office, the com-'mon burdens of the said office, viz. scot, lot, watch 'and ward, and giving suit and presence to the courts 'of the said burgh, and obeying the acts and statutes 'thereof when lawfully cited thereto.' A precept of sasine was granted, 'to be holden and for payment 'of the feu-duty and performance of the other pres-'tations before written;' and sasine was taken, the instrument of which was recorded in the books of the burgh. Dixon having purchased the property from Lawther, presented a bill of suspension of a threatened charge for payment of the price, alleging that the title was inept, because the holding being feu and not burgage, the instrument of sasine ought to have been recorded in the books of the county or the general register. The Lord Ordinary reported the case on memorials; on advising which, the Court refused the bill, in respect, 'that the subjects in ques-'tion form part of, and are situate within the terri-'tory of the burgh, and are, therefore, burgage 'lands; and that the tenure of the property is burg-'age; that sasine falls to be given in the ordinary 'manner by the symbols used in the case of burgage-'holding; and that the instrument of sasine falls to 'be recorded in the register kept for the burgh.'

Suspender's Authorities.—2. Ersk. 4, 9; 1617, c. 6; 49. Geo. III, c. 42, § 1 and 9; Davie, June 2, 1814, (F. C.)
Charger's Authorities.—2. Ersk. 4, 9; Bennet, July 5, 1711, (6895).

D. FISHER,—C. STEWART,—Agents.

No. 162. JAMES CHRISTISON, Advocator.—*A. M'Neill.*
R. GRAY, Respondent.—*More.*

Feb. 1, 1823.
SECOND DIVISION.
Bill-Chamber.
Lord Glenlee.
M'K.

Bill of advocation passed 'on juratory caution,' which the Lord Ordinary had refused to pass except 'on caution.'

R. KENNEDY, W. S.—W. & A. G. ELLIS, W. S.—Agents.

No. 163. T. J. SPENCE and COMPANY, Suspenders.—*Moncreiff—More.*
PHILIP and LAW, Chargers.—*Jeffrey—J. Wilson, Junior.*

Feb. 1, 1823.
SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
M'K.

Poinding.—Philip and Law poinded a quantity of furniture and goods in the house and warehouse of James and George Spence, brothers, for a debt due by them. Warrant of sale was opposed by T. J. Spence, (a son of James, and who was a minor), on the allegation that he was tenant of the above houses, was the sole-partner of T. J. Spence and Company, and that, on the bankruptcy of his father and uncle some years previously, he had bought the poinded effects, which were, therefore, not affectable for their debts. The inferior court having granted a warrant of sale, a bill of suspension was presented, which the Lord Ordinary refused. But on caution being offered at the bar, the Court remitted to pass the bill.

A. FORSYTH & G. MACDOUGALL,—PAT. PEARSON,—Agents.

J. ALLAN.—*Forsyth*—*D. M'Farlane.*
D. KENNEDY.—*Jeffrey.*—
Competing.

No. 164.

Feb. 1, 1823.

SECOND DIVISION.
F.

Bankrupt—Sequestration—Ranking.—In a competition for the office of trustee on Menzies's sequestrated estate, the Sheriff reported, that all the votes for Kennedy, (amounting to £167), ought to be sustained, and all the votes for Allan, (£3,211), rejected. Among the votes for Allan, was one by Robertson and Company, who made affidavit to a debt of £950 as lent cash, and deponed, 'that no part of 'their claim is paid or compensated.' To this it was, inter alia, objected by Kennedy, that Menzies had accepted bills, as cautioner for Robertson and Company, under a contract with their creditors; that a claim under these bills, by Robertson and Company's creditors, had been made against Menzies's estate for £4,000, which compensated the debt, and ought to have been stated and deducted in the affidavit. It was answered for Allan, that the compensation provided by the bankrupt act to be so deducted, was that only which was constituted by a liquid claim, which was not the case here. The Court sustained the report, and confirmed Kennedy as trustee.

G. NAPIER,—D. FISHER,—Agents.

J. DICKSON.—*Gillies.*
J. CARRUTHERS.—*Henderson.*
Competing.

No. 165.

Feb. 3, 1823.

FIRST DIVISION.
H.

The sole question here was, whether the price of certain lands sold under a ranking and sale, or the common agent, in respect of special circumstances,

was liable in payment of an accountant's fee? The Court ordained it to be paid out of the price in the meanwhile, reserving all questions of relief.

G. Todd, Junior,—T. Johnstone,—Agents.

No. 166. Sir W. F. Elliot, Bart. Pursuer.—*Clerk—Moncreiff—Ro. Bell.*

Earl of Minto, Defender.—*Cranstoun—Murray—Fullerton,—et e contra.*

Feb. 4, 1823.

Second Division. Lord Pitmilly. M'K.

Implied Will—Appropriation.—The late Mr. Elliot of Wells executed, in 1806, an entail of his whole estates in Scotland, which contained, inter alia, this clause.—'And I hereby bind and oblige me and my 'heirs-at-law, and my executors and successors, to 'free and relieve the said lands, and the heirs of 'tailzie who shall succeed thereto, of all debts to 'which I shall be liable at the time of my death.' A power of revocation was also reserved to the entailer, but 'only by an express writing under his 'hand.' Of the same date, Mr. Elliot executed a trust-deed of the entailed lands, and of all his other property and funds wherever situated, in favour of certain trustees, the object of which was to pay off the debts affecting the lands he had entailed, gradually, by the appropriation of the rents, without selling any part of them. This, however, the trustees were empowered to do, if they found that the debts could not be paid off by the surplus rents and other funds. The purposes of the trust were declared to be for the payment,—1. Of deathbed, &c. expences. 2. Of an annuity to the heir of entail in possession for the time, during the continuance of the trust.

3. Of debts; and, 4. Of legacies. In 1809, Mr. Elliot executed a supplementary trust-deed, in which, after repeating 'his most anxious wish and desire,' that the debts might be gradually extinguished out of the rents, without a sale of any part of the lands, if it could possibly be avoided,—he proceeds.—'And, 'whereas I am possessed of certain funds and effects 'situated in England, which I may dispose of by a 'deed in the English form; therefore, I hereby de-'clare, that any such deed executed by me, and un-'revoked at my death, shall carry right to the said 'funds and effects situated in England, so far as 'thereby conveyed, settled, or bequeathed; and the 'same shall not be held or considered as falling un-'der my foresaid trust-deed. And I hereby ratify, 'approve of, and confirm, the aforesaid trust-disposi-'tion, in the whole articles, clauses, tenor, and con-'tents thereof, so far as the same is not altered or 'varied by these presents, as before mentioned.' Accordingly, in 1816, a will, in the English form, was executed by Mr. Elliot, in which, after certain special legacies, there follows this clause.—'All my 'books, and whatsoever other property and effects I 'may die possessed of in England, I give and be-'queath unto the Right Honourable Gilbert Earl of 'Minto,' on condition of paying certain additional legacies. 'And I do hereby appoint the said Gilbert 'Earl of Minto, and Ambrose Glover, executors of 'this my last will and testament; and I also confirm 'the entail and trust-deed by me already made of 'my Scotch estate, and of any property in that part 'of Great Britain called Scotland.' Some time after the execution of this deed, Mr. Elliot resolved to discharge part of the debt affecting the entailed estate by a sale of part of the lands, in his own lifetime;

and, accordingly, in 1818, he sold the barony of Ormiston for £28,000. This property, as well as his other lands, was burdened with an heritable bond of £16,000, which was payable in London on a premonition of six months. The purchaser of Ormiston was taken bound to pay £16,000 of the price in London, and various letters by Mr. Elliot were produced, to shew that it was his intention to apply that money in payment of the above debt. Notice was immediately given to the creditor, that the debt would be paid on the expiration of the six months, and the money was, in the meantime, vested in Government three per cent. consols, till the term of payment should arrive. Before this, however, Mr. Elliot died; whereupon, Lord Minto raised action to have it found that he had right, in virtue of the English will, to the whole funds and property situated in England;—that neither the trustees, nor heirs of entail in the Scotch estates had any claim thereto;—and that they were 'liable to free and relieve the pur-'suer, and the English succession, of and from 'the payment of all debts, &c. which fall by law 'to be paid without relief from the Scotch estates 'and funds there.' Sir W. Elliot, the heir of entail, immediately raised a counter-action, to have it declared, that Lord Minto was bound to transfer the £16,000 vested in Government stock to him, or to the trustees, to be applied in liquidation of the debts due by the deceased. These actions having been conjoined, and reported by the Lord Ordinary on informations, two questions arose for the determination of the Court. 1. Whether the sum in dispute had been specially appropriated to the payment of the heritable debt? and, 2. Whether it was præsumpta voluntas of Mr. Elliot, as evidenced by

the several deeds, that Lord Minto, as residuary legatee, should take up the whole funds in England, without relieving the heir of entail of the debts affecting the entailed estates. The Court at first found Lord Minto entitled to the £16,000, without relieving the heir of entail; but, on a reclaiming petition, (while all of their Lordships agreed, that there was no specific appropriation of the fund in dispute, to the payment of the heritable debt), the Court was equally divided as to the question of implied will, and the Lord Ordinary having been called in, they found, 'that the Earl of 'Minto is bound, out of the funds arising from the 'three per cent. consols, coming into his hands as exe-'cutor under the English will, to free and relieve the 'petitioner, Sir W. F. Elliot, and the heirs of entail of 'the estate of Wells, of all debts and obligations 'which burden or affect the said estate;' and decerned accordingly.

Sir W. Elliot's Authorities.—Campbells, Jan. 4, 1747, (5213); Farquharsons, Feb. 10, 1756, (6596; Countess of Cromarty, Jan. 26, 1764, (6601); Waddel, 1814, in House of Lords, March 9, 1819.

Lord Minto's Authorities.—Cheisly, Dec. 21, 1704, (5531); Ker, July 7, 1714, (5533).

WM. BELL, W. S.—TOD & ROMANES, W. S.—Agents.

A. GRANT, Pursuer.—*Moncreiff—Matheson.*
J. FRASER, Defender.—*Cuninghame.*

No. 167.

Feb. 4, 1823.

SECOND DIVISION.
Lord Pitmilly.
F.

Expences.—The Lord Ordinary had given decreet in favour of Grant, but, on account of his conduct in the cause, had found that he was not entitled to his expences. Grant petitioned, but the Court adhered.

JAMES M'DONNELL, W. S.—ÆNEAS M'BEAN, W. S.—Agents.

No. 168. Q. LEVITT and MANDATORIES.—*Jeffrey—Brown.*
S. CLEASBY and MANDATORY.—*Moncreiff—White.*
Competing.

Feb. 4, 1823.

SECOND DIVISION.
Lord Cringletie.
B.

Competition—Arrestment—Factor's Lien.—Hilbers, a merchant in London, purchased oils in Scotland, by means of his clerk, who, in his name, consigned a parcel for sale to Fraser and Fordyce. These persons corresponded with Hilbers alone as to the oil, and sold, on his account, a part of the consignment. In the meanwhile, Hilbers had appointed Levitt his agent in relation to his oil speculations, and desired his clerk to transfer to him all the oils which he had purchased. A transfer was, accordingly, executed to him, but it was never intimated to Fraser and Fordyce. The proceeds were arrested in their hands by Cleasby, a creditor of Hilbers, who had become bankrupt; and they were claimed by Levitt, under a right of lien for his general balance. A multiplepoinding having been brought, the Lord Ordinary held, that there having been no possession of the oil by Levitt himself, or by Fraser and Fordyce for his behoof, he had no right of lien over the price, and he preferred Cleasby. The Court adhered.

Levitt's Authorities.—Whitaker, 65. 105; 2. Bell, 129; Mann, 3. East. 538.
Cleasby's Authorities.—Whitaker, 111; 2. Bell, 128–9.

BRODIE & IMLACH, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

J. MACDONNELL, W. S. Pursuer.—*Moncreiff—Matheson.*
M'KENZIE and MANN, Defenders.—*Cockburn—Buchanan.*

No. 169.

Agent and Client—Settled Account.—M'Kenzie having contracted an account of law-expences to Macdonnell, assigned to him a debt in security. In the assignation, there was a right reserved to state all objections competent to him, and to have the account taxed by the auditor of Court. Thereafter M'Kenzie became bankrupt, and Macdonnell was ranked on his estate without objection. He was discharged on a composition, for which Mann was cautioner; and Macdonnell received that which was due upon his debt, by means of diligence. For the expence of the diligence, (being £7), he raised action against M'Kenzie and Mann, who stated in defence, that they were still entitled to have the original accounts taxed by the auditor. The Lord Ordinary decerned in terms of the libel, and explained in a note, that he 'entertains no doubt, that many cases might be stated, 'where the Court would open up a writer's account, 'upon a direct allegation of gross or fraudulent over-'charges. But it would require a very strong case 'and charges of that nature, to open up an account 'where payment has actually been made. Indeed, 'the law of Scotland, so far as the Lord Ordinary 'knows, affords no instance of this; and, in the pre-'sent case, there is no allegation of corrupt and fraud-'ulent charges, and the sum in dispute is a mere 'trifle.' The Court adhered.

Feb. 6, 1822.

FIRST DIVISION. Lord Alloway. D.

J. MACDONNELL, W. S.—H. M'QUEEN, W. S.—Agents.

No. 170. MRS. MOWAT and Others.—*Cranstoun—Cockburn—Rutherfurd.*
D. M'CULLOCH.—*Fullerton—Moncreiff——Maitland.*
Competing.

Feb. 6, 1823.

FIRST DIVISION. Lord Kinedder. S.

Tailzie—Clause—Destination.——The late Robert Muir was proprietor of two estates,—Livingstone, and Glenquichen. He had a son, Adam, and two daughters, Jane and Margaret. By a deed of entail, he disponed the two estates 'to and in favour of Adam 'Muir, my only son, and the heirs-male lawfully to 'be procreated of his body respectively and successively; whom failing, to my other heirs of tailzie 'and provision after mentioned, always with and 'under the express reservations, conditions, provisions, faculty, clauses irritant and resolutive, after 'mentioned, allenarly and no otherwise, as mentioned in the procuratory of resignation after insert.' He there authorized resignation to be made of the two estates in favour of 'the said Adam Muir and 'the heirs-male lawfully to be procreated of his body 'respectively and successively; whom failing, to the 'heirs-female to be lawfully procreated of the body 'of the said Adam Muir, and the heirs-male to be 'lawfully procreate of their bodies respectively and 'successively; the eldest heir-female always succeeding, without division, through the whole course 'of succession, and excluding all heirs-portioners.' Then followed this clause.—'Whom failing, as to 'the lands and barony of Livingstone, &c., to and in 'favour of Jane Muir, my daughter, now spouse, '&c., and the heirs lawfully procreate or to be procreate of her body in this or any other marriage;

'whom all failing, to my nearest heirs and assignees 'whatsomever: And as to the foresaid nine merk 'land of Kirkmabreck and other lands above dispon- 'ed and described, (viz. Glenquichen), failing of the 'said Adam Muir and the heirs-male and female 'descending of his body in manner above mentioned, 'to and in favours of Margaret Muir, also my 'daughter, spouse to David Thomson, ay and until 'Adam Thomson, her second son, attain to the age 'of 21 years complete; and then to the said Adam 'Thomson, and the heirs to be lawfully procreate of 'his body; whom failing, to the heirs procreate of the 'said Margaret Muir, of this or any other marriage; 'whom all failing, to my own nearest heirs and as- 'signees whatsomever.' Adam Muir succeeded to both estates, but died without issue. On his death, the estates divided,—Livingstone falling to his sister Jane, and Glenquichen to Adam Thomson, son of his sister Margaret, who had predeceased him. Margaret left six daughters, of the eldest of whom, Mr. M'Culloch was the son, and Mrs. Mowat and others were either the younger daughters, or their descendants. Adam Thomson died without issue, on which event a competition arose for Glenquichen. Mr. M'Culloch alleged, that, being the son of the eldest daughter, he was entitled to succeed, to the exclusion of all the others, under the clause, declaring that the eldest heir-female should succeed without division. Mrs. Mowat and others contended, that that clause related entirely to the destination in favour of Adam Muir and his heirs,—that it did not apply to the event of the estates being separated,—and that, consequently, they, as heirs-portioners, were entitled to

succeed equally. Mutual advocations of services having been brought, the Lord Ordinary reported them, when the Court found Mrs. Mowat and others 'entitled to be served heirs-portioners of provision 'under the settlement of the said Robert Muir of 'Glenquichen;' and afterwards adhered.

Mowat's Authorities.—Leslie, Dec. 15, 1710, (15358); Earl of March, Feb. 27, 1760, (15412); Richardson against Stewart, July 6, 1821, (Ante, Vol. I, No. 131).

M'Culloch's Authorities.—2. Machen., 325; Kilk. 463; Newlands, July 9, 1794, (4289); 4. Ersk. 8, 14; M. of Clydesdale, Dec. 16, 1725, ( ); Tinnoch, Nov. 26, 1817, (F. C.); D. of Roxburghe, June 23, 1807.

H. J. Wyllie,—Corrie & Welsh, W. S.—Agents.

No. 171.

John Webster, Pursuer.—*Clerk*—*Campbell.*
Mrs. Ann Webster or Guthrie, and Others, Defenders.—*Jameson.*

Feb. 6, 1823.

Second Division.
Lord Meadowbank.

B.

Clause—Conditional Institution.——Ann Caroline, Sophia, and Marion Brands, sisters, having purchased certain heritable subjects, the disposition was taken 'to and in favour of Ann Caroline, Sophia, and 'Marion Brands, in conjunct fee and liferent, the 'longest liver of them, and to the assignees of the 'longest liver, and, in the event of their sister, Miss 'Isobella Brand, surviving them, to and in favour 'of James Brand, Esq. banker in Aberdeen, and 'William Kennedy, advocate there, in trust for be-'hoof of the said Isobella Brand, during all the days 'of her lifetime, but for her liferent use only, and, 'after her death, to Mrs. Margaret Brand, (another 'sister), relict of the deceased Thomas Webster, of

'Balcaithly, in liferent, but for her liferent use only, 'and to Ann, Margaret, and Sophia Websters, 'daughters of the said Thomas Webster, equally 'among them, their heirs and assignees whatsoever, 'in fee.' No infeftment was taken on this disposition. Ann Caroline Brand survived all her sisters; and, on her death, the defenders, Ann, Margaret, and Sophia Websters, served themselves heirs of provision under this disposition, and were infeft on the unexecuted procuratory of resignation. John Webster, their only brother, the pursuer, having served himself heir general of Ann Caroline, the survivor of his aunts, raised the present reduction of his sisters' titles, on the ground, that they were merely conditional institutes in the event of Isobella Brand surviving her sisters; that this condition not having been purified, the institution fell, and that he was, therefore, entitled to succeed to the subjects as heir-general to Ann Caroline. The Lord Ordinary reported the case on memorials; and the Court, being of opinion that the liferent provision to Isobella was not a condition affecting the grant of the fee to the defenders, assoilzied them from the conclusions of the libel.

W. Dallas, W. S.—Charles Gordon,—Agents.

No. 172. Mrs. E. Boyes and Others, (Trustees of the late John Boyes), Pursuers.—*Moncreiff—Ivory.*
James Henderson, Defender.—*Forsyth.*

Feb. 6, 1823.

Second Division. Lord Pitmilly. M'K.

1669, c. 9—*Quinquennial Prescription.*—The late John Boyes raisd this action, (carried on by his trustees since his death), against Henderson, as representing his father, for payment of rents of a brewery, the property of Boyes, 'lying within the burgh of 'Hamilton,' which had been let by his grandfather to a company, of which his father, and Henderson's father, were partners. Henderson pleaded the quinquennial prescription. The pursuers contended, that this prescription did not apply to urban tenements. The Lord Ordinary sustained 'the plea of prescrip-'tion;' and the Court adhered, 'but, without pre-'judice to the pleas of parties in an action of 'count and reckoning,' as to their respective claims arising out of the partnership.

Pursuers Authorities.—2. Bankt. 12, 29; 3. Ersk. 7, 20; Nisbet, July 10, 1729, (11059).

Defender's Authorities.—Deas, Dec. 29, 1710, (11056); Duff, March 7, 1771, (11059).

Gibson, Christie, & Wardlaw, W. S.—J. Granger, W. S.—Agents.

STEPHENSON'S TRUSTEES, Pursuers.—*Cuninghame—Cathcart.*
MARQUIS of TWEEDDALE, Defender.—*Clerk—Murray.*

No. 173.

Feb. 7, 1823.

FIRST DIVISION. Lord Alloway. S.

Tack—Assignation.—In 1798, W. Stephenson acquired right to a lease of Snowdon for 16 years, and for his lifetime, if he should survive that period, excluding assignees. He was also tenant of Quarryford, on a lease of similar endurance; both of which farms belonged to the Marquis of Tweeddale. Having become embarrassed, Stephenson, in 1818, agreed to renounce Snowdon, in order that it might be relet, on condition of being paid two-thirds of the surplus rent, or an annuity of £100 during his life. At the same time, he executed a trust-deed in favour of the pursuers, for behoof of his creditors, by which he conveyed to them all his stock: and, in the event of its being inadequate to pay his debts, he bound himself to assign the surplus rent so soon as the farm was relet, under condition of payment, by the trustees, of all arrears to the Marquis. After the farm had been relet, this deed was intimated to the Marquis's factor, who acknowledged it, and stated, that 'the surplus 'rent which Mr. Stephenson is entitled to from 'the farm of Snowdon during his life, is £100 per 'annum.' The trustees paid the arrears to the Marquis, and, at the distance of three years, Stephenson executed a special assignation to them of the surplus rent, which was duly intimated. The Marquis resisted payment, on the ground, that he was entitled to retain the surplus rent in security of arrears due for Quarryford; and maintained, that the original

assignation was inept, as it was a mere obligation to assign in case of the failure of other funds; and that he could not be deprived, by the posterior assignation, of his right of retention. In an action for payment, the Lord Ordinary decerned in terms of the libel, in respect 'that the transaction by which William Stephenson renounced the lease of Snowdon, 'and, in consequence of which, that farm was let at 'a considerable surplus rent, was a beneficial transaction for the Marquis of Tweeddale, the landlord, and 'that he cannot take the benefit of the surplus rents, 'without carrying into effect the assignation granted to the pursuers, which appears to be a part of 'the transaction; one of the conditions of the assignation being the payment by the pursuers of the 'whole arrears of rent and public burdens due at 'that period, and which, it is not disputed, were paid 'by the pursuers.' To this interlocutor the Court adhered.

J. TWEEDIE, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

No. 174.

D. KENNEDY, Senior and Junior, Suspenders.—*Jameson—Fletcher.*

JOHN CAMERON, Charger.—*Solicitor-General Hope—Lockhart.*

Feb. 7, 1823.

SECOND DIVISION. Bill-Chamber. Lord Bannatyne. F.

Bill of Exchange—Theftboot.—Cameron charged Kennedys, on a bill accepted by them, and drawn by one M'Phie, and by him indorsed to Cameron. Kennedys presented a bill of suspension with caution, alleging, that the bill was void, having been granted by them to induce M'Phie to drop a threatened pro-

secution for theft, on a charge for which, however, they were afterwards tried and acquitted. The bill charged on had been produced in evidence on the trial. Cameron averred, that he was a bona fide onerous indorsee, prior to the trial. It appeared, however, from a registered protest, that the indorsation had been posterior to the trial, and a part of the bill, on which the date of indorsation had been written, having been evidently torn off, the Court, (altering the Lord Ordinary's interlocutor), passed the bill.

COLL. M'DONALD, W. S.—D. M'LEAN, W. S.—Agents.

MADAME SASSEN, Petitioner.—*Cranstoun—Rutherfurd—A. Wood.*
SIR J. CAMPBELL, Respondent.—*Clerk—Fullerton.*

No. 175.

Feb. 8, 1823

FIRST DIVISION.
D.

Husband and Wife—Aliment.—Sir J. Campbell, while detained in France during the war, cohabited with, and had a daughter by the petitioner, a native of Prussia. He sent her to this country, with a letter of attorney to transact certain affairs, in which he designed her as his 'beloved wife.' Having afterwards deserted her, she raised an action before the Commissaries, concluding to have it declared, that she was his wife; to ordain him to adhere; or to find him liable in damages for inducing her to believe that she was his lawful wife. The Commissaries, pending the suit, gave decree for interim-aliment; but, at last, assoilzied him from the declaratory conclusions, and decerned against him for £300 per annum during her life. Both parties having presented bills of advocation, the Court, on the report of the Lord Ordinary, ordered a hearing in presence. The petitioner then applied for an interim-decree for

No. 178. J. M'DONNELL, W. S. Petitioner.—*Matheson.*

Feb. 8, 1823.
SECOND DIVISION.
F.

Agent and Client—Expences—A. S. 6th February 1806.—This was an application by M'Donnell, (under the Act of Sederunt 6th February 1806), to obtain his accounts taxed, and decreet against his clients for the expences incurred, in an action in which he had acted as agent; and he further craved the expence of this application. The Court decerned for the expences in the cause, and the actual outlay of the application, but refusing any thing for the agent's own trouble.

J. M'DONNELL, W. S.—Agent.

No. 179. G. SANDERS, (Trustee on ATTWELL'S Sequestrated Estate), and Others, Creditors, Complainers.—*Jeffrey—Jameson.*

J. KIBBLE and G. STEWART, Respondents.—*Moncreiff —M'Neill.*

Feb. 8, 1823.
SECOND DIVISION.
F.

Bankrupt—Sequestration—Complaint against Commissioners.—Sanders, as trustee, and others, as creditors, on the sequestrated estate of Attwell, presented a complaint to the Court, charging Kibble and Stewart, two of the commissioners, with a breach of duty, by concealing from the trustee a proposal by the bankrupt to pay their debts in full, on conditions inconsistent with the general interest of the creditors; and of refusing, when called on, to give any explanation. They, therefore, prayed the Court to 'remove them from their offices of commissioners;' and, further, 'in case it shall appear that they have,

'directly or indirectly, received payment out of the 'funds belonging to the bankrupt, to ordain them to 'repeat and pay over to the trustee, for the general 'behoof, the amount of such payments, or to do 'otherwise in the premises,' as the Court should deem just. It was objected, that the complaint was incompetent, the bankrupt-act giving no authority to petition for the removal of commissioners, but merely to make them account for their conduct. The Court repelled the objection, as they were here called on to judge of the conduct of the commissioners, and if it were proved that they were unworthy of the trust, the Court must remove them; and, on the merits, in respect of the facts established, they found, 'that the respondents, in not communicating immediately to the trustee, the corrupt proposition stated to have been made to them through the medium of Mitchell, which they say they rejected; and 'in having afterwards refused to give full information regarding it, when required by the trustee, 'acted in violation of their duty as commissioners 'under the statute.' Before, however, proceeding farther, their Lordships remitted to the trustee, to require from them a full explanation of the grounds of the complaint; and thereafter, if he should see cause, to apply of new to the Court.

G. MACDOWALL—JAS. BRIDGES, W. S.—Agents.

W. FYFE, Suspender.—*Cockburn—Rutherfurd.*
P. LAING, Charger.—*L'Amy.*

No. 180.

Feb. 8, 1823.

SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
M'K.

Process—Small Debt Act—Jurisdiction.—The Lord Ordinary refused, as incompetent, a bill of suspension presented by Fyfe, of a charge at Laing's in-

stance, on a decree of the justices of peace, in the small debt court, for £5, on an account making altogether £5 15s.,—15s. of which, however, were deducted in the claim, as having been already paid. Fyfe petitioned and pleaded, that the justices had no jurisdiction, because,—1. In order to give decreet for the £5, they were obliged to decide on the merits of all the items of an account above £5; and, 2. One item of the account decerned for was a claim of damages against Fyfe, for having incarcerated Laing for payment of a debt, after he had agreed to accept a bill for the amount, which claim was incompetent before the justices under the small debt act. The Court, being satisfied that the justices had not exceeded their powers, adhered to the Lord Ordinary's interlocutor.

Charger's Authority.—Turnbull, Feb. 14, 1801, (F. C.) (Ap. Jurisdiction, No. 9).

ROBERT BURNETT, W. S.—GEO. GORDON,—Agents.

No. 181.

J. CARMICHAEL, Advocator.—*J. W. Dickson.*
Reverend W. M'RITCHIE and Others, (Trustees of the late D. CARMICHAEL), Respondents.—*Jameson.*

Feb. 8, 1823.

SECOND DIVISION. Bill-Chamber. Lord Robertson. M'K.

Homologation.—Carmichael raised action before the Sheriff of Perth, against the respondents, trustees under the settlement of his deceased father, for payment of legitim. It being established, however, that having been nominated one of the trustees by his father's settlement, he had accepted the office, and acted as such, and had also received payment of a small legacy provided to him by the trust-deed, the Sheriff found that he had homologated the same, and

thereby passed from his claim of legitim, and assoilzied the trustees. The Lord Ordinary refused a bill of advocation, and the Court adhered.

J. Brown & J. Lawson, W. S.—J. & W. Murray, W. S.—Agents.

T. Carmalt, Pursuer.—*Moncreiff—Boswell.*
G. Haggarty, Defender.—*Cuninghame.*

No. 182.

Feb. 11, 1823.

First Division.
Lord Alloway.
S.

Registry Acts—26. Geo. III, c. 60—34. Geo. III, c. 68.—Carmalt, the registered owner of the sloop Otter, sold her to Haggarty for £500, payable by two bills at different dates; on condition that a vendition should not be executed and delivered, until the price was paid. Possession was given to Haggarty; one of the bills was retired; and diligence was raised on the other, under which Carmalt arrested the vessel. In a process of sale before the Judge Admiral, (to which Haggarty was personally cited, but failed to appear), the vessel was sold, and the proceeds applied in payment pro tanto of the bill. For the balance of the bill, amounting to £147, and for certain furnishings and damages, which Carmalt was liable for as the registered owner, he instituted an action against Haggarty. After various proceedings, it was objected, that the sale was, ab initio, null under the registry acts; that consequently no action was competent for payment of the price; and Carmalt, being the sole owner, was exclusively liable for the furnishings and damages. The Lord Ordinary, in respect of the decision in Wilson's trustees against Miller, 2d December 1808, decerned in terms of the libel; and, on a representation, he adhered, stating in

a note, that he saw no reason to doubt the authority of that case; but that 'even the particular circumstances of this case hardly admit the consideration 'of the abstract question. The whole price of the vessel, except the balance, had been paid several years 'ago. The vessel herself had since been sold by authority of the Judge-Admiral. Could Haggarty 'found upon his own fraud, and retain the ship, and 'draw the emoluments which arose from the vessel, 'without paying the balance of the price? The statutes in question have received full effect by the respondent being rendered liable for the ropes ordered 'and received by the representer, and from the damage committed by the act of the representer, and he 'is therefore entitled to be relieved of those sums 'which he has been obliged to pay for his behoof.' The Court, however, altered 'the interlocutor reclaimed against, and find that the sale of the sloop Otter 'by the respondent (Carmalt), to the petitioner '(Haggarty), was void and null ab initio, and that 'the respondent is liable in repetition of the partial 'payments of the price received, and has no claim 'against the petitioner, either on account of the remaining balance of the price, or of the expences 'bestowed on the vessel: Find further, That the 'petitioner must account to the respondent, as 'owner of the vessel, for all sums received by him 'in name of freight, as well as for the damages stated in the summons, if any shall be found due;' and remitted to the Lord Ordinary to adjust accounts betwixt the parties on these terms. To this interlocutor their Lordships afterwards adhered.

The distinction between this case, and that of MacLachlan's, (ante, Vol. II, No. 30.), was stated on the

Bench to be, that, in the latter, a tender of a vendition had been made and refused; whereas no such circumstance occurred here.

Pursuer's Authorities.—M'Nair, Dec. 2, 1808, (F. C.); 1. Holt on Shipping, 296; The Sisters, 5. Robinson, 155; Camden, 7, T. R. 709.
Defender's Authorities.—7. T. R. 121; Leitch, May 20, 1819, (F. C.); Spence, Jan. 20, 1809, (F. C.); Porter, Dec. 11, 1816, (F. C.); 1. Holt, 297, and cases there; Yallop, 15 Vesey, 66; Speldt. 13 Vesey, 589; Battersby, 3. Mad. Rep. 110.

J. Dunlop, W. S.—Greig & Peddie, W. S.—Agents.

P. Cochran, Suspender.—*Clerk—Fullerton.*
W. Manson, Collector of Poor's Rates, Charger.—*Cranstoun—Moncreiff—Blackwell.*

No. 183.

Feb. 11, 1823.

First Division. Lord Alloway. D.

Poor—Stat. 1579, *c.* 74.—The heritors and kirk-session of the landward parish of Kilbarchan having resolved, (contrary to their former practice), to assess the whole means and substance, wherever situated, of the inhabitants, for the support of the poor, charged Cochran with £25, in his character of householder, and £1, as proprietor and tenant of a small villa. Of this he resisted payment, on the ground, 1. That he was liable to be assessed only on his property situated within the parish; 2. That the act 1579, c 74, which ordains a stent to be raised 'upon 'the haill inhabitants within the parochine, according 'to the estimation of their substance,' was confined to royal burghs, or, at least, was in desuetude as to country parishes; and, 3. That he had been illegally assessed in three different characters. The Lord Ordinary, in a suspension, found, 'that, in the case of 'Lawrie against Dreghorn, 2d December 1807, it 'was unanimously decided by the Court, that Mr.

'Dreghorn was liable for his proportion of poor's 'rates not only upon his heritable and personal pro- 'perty situate within the burgh, but upon his move- 'able property, wherever situated, and that the sta- 'tute equally applies to persons residing in a town or 'a landward parish; that the authority of the case of 'Dreghorn is not affected by the judgment of the 'First Division in the case of the Heritors of Cargill, 'where it was found, that the legal rule of assessing 'tenants and possessors 'is according to their means "and substance within the parish,' and not according 'to the mode which had been there exercised, of 'charging a different rule against tenants who paid a 'certain rent, from what was charged against tenants 'who paid a lower rent; so that no question occur- 'red in that case, whether a person residing in the 'parish, and holding personal property without the 'parish, could be taxed in his means and substance, 'as in Dreghorn's case; and, therefore, in respect 'of the case of Dreghorn,' his Lordship found the letters orderly proceeded. The Court adhered.

Their Lordships were unanimously of opinion, that the act 1579, c. 74, was not in desuetude; that the rule there fixed was applicable to landward parishes; and that the personal estate, wherever situated, of those residing within the parish, was liable to be assessed; but it was observed, that if the party possessed property in any other parish, on which he was liable to be assessed, he would be entitled to a corresponding deduction.

Suspender's Authority.—Heritors of Cargill, Feb. 29, 1816, (F. C.)
Charger's Authorities.—1579, c. 4; 1592, c. 147; 1597, c. 268; 1600, c. 19; 1617, c. 10; 1663, c. 16; Proclam. Aug. 11, 1692, and March 3, 1698; 1695, c. 43; Scott, Jan. 19, 1773, (10577); Inverask, March 28, 1794, (10585); Lawrie, Dec. 2, 1807, (10587).

R. Hotchkis, W. S.—A. Pearson, W. S.—Agents.

MAJOR-GENERAL SHARPE, of Hoddam, Petitioner.— *Hamilton.* No. 184.

Nobile Officium.—The Court authorized the purchase of certain 'superiorities,' with part of funds directed, by Sharpe of Hoddam, deceased, to be laid out in acquiring 'lands,' as contiguous to the entailed estate of Hoddam as possible, to be settled on the heirs, and under the conditions of the entail; there being no opposition, and the Lord Ordinary having reported, that it would be advantageous to the estate, and would serve to make up a freehold qualification for the benefit of the heirs of entail.

Feb. 11, 1823.

SECOND DIVISION Lord Mackenzie. M'K.

M'KENZIE & SHARPE, W. S.—Agents.

DANIEL M'KENZIE, Pursuer.—*Walker.* W. ROBERTSON and COMMISSIONERS, Defenders.— *Forsyth.* No. 185.

Service, Reduction of.—M'Kenzie having expede a general service as heir to the reverser in an adjudication, and raised this action of reduction of a decreet of expiry of the legal, which had been obtained by Robertson, the latter immediately brought a counter-action of reduction of M'Kenzie's service. The Lord Ordinary, without waiting for the result of this action, decerned in the reduction of the decreet. Robertson petitioned, and the Court, holding that the validity of the service was a preliminary question, which must first be tried, recalled, in hoc statu, the Lord Ordinary's interlocutor, and remitted to allow the defenders to proceed with the reduction of the pursuer's service.

Feb. 11, 1823.

SECOND DIVISION. Lord Pitmilly. F.

Pursuer's Authorities.—Robson, Jan. 22, 1799, (16139); Burnet, Feb. 18, 1756, (14429).
Defenders Authorities.—S. Stair, 5, 33; Hunter, July 8, 1812, (F. C.)

J. & W. Ferrier, W. S.—J. Stuart,—Agents.

No. 186.

R. Highgate, Advocator.—*Currie.*
W. Boyle, Respondent.—*Greenshields.*

Feb. 12, 1823.

First Division.
Lord Meadowbank.
D.

Agent and Client—Writer's Responsibility.—Highgate employed Boyle, a writer, to protest and raise diligence on a bill which fell due on the 15th of July 1810, against Colvin, the acceptor. This was done, and caption obtained early in August thereafter. No steps, however, were taken by Boyle, to execute it; and Colvin, about ten months thereafter, went abroad insolvent. In 1816, Highgate brought an action before the Sheriff of Ayrshire, against Boyle, for payment of the debt, on the ground of negligence. The latter denied that he had been employed at so early a period as that alleged, or that he had ever been expressly instructed to execute the caption. The Sheriff, after a proof, assoilzied Boyle, in respect that he considered 'an agent entrusted with the execution of business, to be vested, in a certain degree, with discretionary power, when and how to act, which is not the case with a messenger. The latter is, therefore, bound to a more punctual execution; and, an agent to be made liable, must be tied down by more explicit instructions.' But, in an advocation, the Lord Ordinary, and the Court, being satisfied that there had been negligence, decerned against Boyle.

C. Gordon,—F. Fraser,—Agents.

EARL of STAIR, Pursuer.—*Clerk—Cranstoun—Moncreiff.*
EARL of STAIR'S TRUSTEES, Defenders.—*Solicitor-General Hope—Thomson—Jeffrey—Murray.*

No. 187.

Feb. 12, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Clause—Interest.—John, Earl of Stair, executed a deed of entail of his lands of Culquhaisen, and also a trust-disposition, and deed of settlement, by which he conveyed all his other heritable estate, together with all his personal property, to the defenders in trust. After providing for payment of his debts, certain legacies and annuities, he appointed his 'said trustees and their foresaids, to lay out the 'residue of the trust-funds, and interest, and pro-'ceeds thereof, in purchasing lands in the shires of 'Wigton, or Ayr, or Stewartry of Kirkcudbright, 'and at the sight, and with the advice and con-'sent of the Lord President of the Court of Ses-'sion, and of his Majesty's advocate for Scotland, 'for the time being, to annex the same to my en-'tailed estate, by taking the rights and securities 'of the lands so to be purchased to the same 'heirs of tailzie, and under the same conditions, '&c. contained in the disposition and tailzie of my 'lands of Culquhaisen, and others executed by me.' His Lordship died on the 1st of June 1821, leaving a trust-estate of the value of upwards of £200,000. The pursuer succeeded as heir of entail to the estate of Culquhaisen; and, immediately thereafter, he raised action against the trustees to have it found, that he 'has right, under the said trust-deed, to the whole 'interest, dividends, and proceeds of the real and per-'sonal estate left by the said Earl, from and after the

'day of his death;' and concluded, that the trustees should account to him accordingly. The ground on which he rested this demand was, that the above clause conveyed to the trustees the interest and proceeds only which had fallen due *before* the trust-funds were recovered; but not the interest arising on the accumulated fund *after* it was realized. In defence, the trustees maintained,—1. That this interpretation was inconsistent with the object of the deed, which was to accumulate a large fund, with the view of purchasing extensive estates, and of thereby encreasing the opulence and dignity of the family of Stair; and, 2. That the words were express, the appointment being 'to lay out the *trust-funds*, and inte-'rest and proceeds *thereof*.' The Lord Ordinary at first found, that it was only in the character of heir of entail, that the pursuer 'has any claim under the 'trust-deed executed by the late Earl, and that the 'trustees are bound to convey to him, merely in that 'character, the lands purchased by them, with the 'residue of the trust-fund; That John, Earl of Stair, 'died upon the 1st June last, and that no delay or 'tardiness has been pointed out upon the part of the 'trustees in the execution of their trust; that, there-'fore, in hoc statu, there is no claim upon the part of 'the pursuer for any interest that may have arisen 'upon the funds of the late Earl, from the time of 'his death upon the 1st June last; reserving to the 'pursuer to be heard, in case any improper or unne-'cessary delay take place, whether he may not then 'be entitled to claim the interest of the residue of 'the funds not vested in lands, as a surrogatum for 'the lands so directed to be purchased and entailed 'upon him and the other heirs, and to the defend-

'ers, their defences, as accords.' Thereafter, on mutual representations, his Lordship reported the case; and the Court assoilzied the trustees.

Pursuer's Authority.—Sitwell, 6. Vesey, jun. 320.

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. & A. SMITH, W. S.—Agents.

LADY MONTGOMERIE.—*Clerk—Cranstoun—Jameson.* No. 188.
RUNDELL, BRIDGE, and RUNDELL, and Others.—*Moncreiff—T. H. Miller—Rutherfurd.*
Competing.

Feb. 12, 1823.

FIRST DIVISION. Lords Gillies and Meadowbank.

H.

Clause.—The late Lord Montgomerie married Lady Mary Montgomerie, who was possessed of a large personal estate, of a very valuable entailed property in land, and of unentailed landed property to a considerable amount. Upon the dissolution of the marriage, by the death of Lord Montgomerie in 1814, it appeared that the whole of her Ladyship's personal estate had been spent during the subsistence of the marriage, and that Lord Montgomerie owed debts to a large amount, far exceeding the value of the funds left by his Lordship. Although Lady Montgomerie succeeded to nothing by the death of her husband, and represented him no otherwise than as having been confirmed his executrix qua relict, yet, she formed the intention of paying off his debts, and, for that purpose, of disposing of a considerable part of her unentailed property, and of surrendering the rents of her whole estate, reserving out of them only a suitable annuity for her maintenance. It was calculated, that these rents, together with the price of the lands proposed to be sold, and the produce of Lord

Montgomerie's funds, would be sufficient, in the course of five years, to pay the debts, as then estimated. With those views, Lady Montgomerie, on the 16th of July 1814, subscribed a minute, which, after mentioning that the debts amounted to £99,000, (afterwards calculated at £100,000,) specified the funds left by his Lordship at £50,000, including the family plate, and the furniture at Coilsfield, both of which were to be retained by her at a valuation. The minute, after stating, that, to provide for payment of the balance, certain lands were to be sold to Lord Eglinton, at the price (as was expected) of £22,820, proceeded in these words.—'As Lady Montgomerie 'has resolved to restrict her expenditure to £5,000 'a-year, and to allow the remainder of the free rents 'of her estate to be applied towards the extinction 'of the balance of the debt, it is calculated that the 'debts may, in this way, be all discharged in the 'course of five years, including the expences necessary 'for carrying the arrangement into execution.' And it concluded by mentioning, 'that Lady Montgomerie 'having fully considered the particulars before stated, approves of, and agrees to the arrangement suggested, and has accordingly executed a commission in favour of (certain persons), for carrying the 'same into execution.' On the same day, she granted a commission in favour of these persons, which, on the narrative of her having resolved to pay off all the debts, 'from the sales of the fee-simple lands, and 'the savings of the rents of her entailed estates, as 'after-mentioned,' empowered the commissioners to sell the lands specified in the minute, to dispose of the personal estate of Lord Montgomerie, to which she was in the course of making up a title, and to

apply the prices and produce, together with the rents and profits of her other lands, with the exception of what might be required for defraying the expences of her own establishment, (estimated at £5,000 a-year,) towards the gradual payment and extinction of the debts, 'all as mentioned and contained, as far as cir- 'cumstances are at present known, in a statement 'and minute subscribed by me of this date, and bear- 'ing reference hereto.' Another conveyance, on the 1st of October following, was executed by her in favour of the same commissioners, which, after narrating the previous arrangement, and that 'having 'been generally communicated to the creditors in the 'said debts, as well in England as in Scotland, they 'have signified their acquiescence in the same, upon 'my granting these presents,' contained this obligation. 'Therefore, I do hereby bind and oblige myself, my 'heirs, &c. to implement and fulfil the foresaid state- 'ment and minute, by making payment and satisfac- 'tion of the debts therein and before referred to, ac- 'cording to the foresaid estimated amount, and in the 'way and manner specified in the said state and mi- 'nute, or as nearly so as circumstances will admit.' And with respect to the rents reserved by her Ladyship, the deed provided, that 'my said commissioners shall 'make payment to me yearly, and each year, and by 'such instalments as I may find necessary, of the 'sum of £5,000 sterling, free of all deductions what- 'ever.' After this trust had existed for five years, it turned out that Lord Montgomerie's debts greatly exceeded the estimated amount; and, on the other hand, in consequence of an extraordinary depression in the value of landed property and its produce, particularly felt in that part of the country, where

Lady Montgomerie's property was situated, the rents of her estate were greatly diminished, and those actually recovered, during the five years immediately subsequent to the date of the minute and commissions, fell greatly short of the rents which were payable, or which the estate was calculated to yield at the period when the arrangement was agreed to. Notwithstanding of this, the creditors insisted that they were entitled to the free surplus rent, not merely for a period of five years, but until such time as those rents, together with the other funds, should be sufficient to pay Lord Montgomerie's debts to the extent of £100,000, with interest from that period. In order to settle this question, the trustees raised an action of multiplepoinding and exoneration, in which the Lord Ordinary, (Gillies), found, 'that in so far as the foregoing writings imposed any obligation on Lady Montgomerie, the same was in its nature purely gratuitous, since her Ladyship neither stipulated, nor received from the creditors in return, any valuable consideration whatever, the reservation of the furniture at Coilsfield, and the family plate at a fair valuation, being a condition equally advantageous to both parties; that an obligation of this sort is to be interpreted in the most favourable manner for Lady Montgomerie, and must be explained and controuled by the understanding of parties, and by the views and intentions of the granter at the time of entering into it, as indicated by the terms of the minute which she then subscribed, and to which both the commissions granted by her Ladyship expressly refer; that the estimated amount of Lord Montgomerie's debts on

'the one hand, and the amount of the rent of 'her Ladyship's estate on the other hand, formed 'the basis of the arrangement agreed to by her; 'and, therefore, if it appears from the minute that 'she at the time laboured under any material error, 'as to any one or both of those points, and was misin-'formed or mistaken, either as to the amount of Lord 'Montgomerie's debts, or with respect to the amount 'and permanency of her own rental, the obligation 'undertaken by her must be limited and restricted 'accordingly.' And his Lordship, after finding that there had been a great change of circumstances, held, 'that, according to the present rental of the estate, 'and the plea of the creditors, they would be entitled 'to the rent for a period equal to the probable dura-'tion of Lady Montgomerie's life; that such a claim is 'inconsistent with what must be presumed to have 'been the understanding of parties at the period when 'the arrangement in question was made; that the ob-'ligation undertaken by Lady Montgomerie will be 'sufficiently implemented by her commissioners mak-'ing payment, (as she proposes that they should do), 'to the creditors, of the whole free rent which they 'received, or which, consistently with the rules of 'good management, they might have recovered from 'the estate, deducting the sum reserved by her for 'the period of five years posterior to the com-'mencement of their possession under the com-'missions, the commissioners also accounting to the 'creditors for the price of the property which was 'sold to the Earl of Eglinton:' Therefore, his Lordship preferred 'the creditors to the extent of the 'price aforesaid, and to the extent of the five years' 'rents as aforesaid, and also to the extent of the

'whole of the funds of the late Lord Montgomerie, so 'far as the same are here in medio: and quoad ultra 'preferred Lady Montgomerie to the whole sums in 'the hands of the raisers of the multiplepoinding, 'and decerned in the preference accordingly.' The latter part of these findings was altered by Lord Meadowbank; but the Court, on mutual reclaiming petitions, adhered to that pronounced by Lord Gillies, and recalled that of Lord Meadowbank, in so far as it altered it; reserving the question as to what should be held sufficient diligence by the trustees.

Lady Montgomerie's Authorities.—3. Erak. 3, § 87, 90, 92.
Creditors Authorities.—3. Erak. 3, § 82, 87, 89, 91.

RUSSELL, ANDERSON, & TOD, W. S.—INGLIS & WEIR, W. S.—Agents.

No. 189. MRS. F. BOURNE and Others, Pursuers.—*M'Farlan—Cranstoun.*
E. GAIRDNER, Defender.—*Moncreiff—T. H. Miller.*

Feb. 12, 1823.

SECOND DIVISION. Lord Craigie. M'K.

Sale.—The pursuers sold to Gairdner a property in England, and engaged to give him 'a clear mar-'ketable' title. In an action in this Court for implement of the contract, Gairdner pleaded, in defence, that the sellers had not fulfilled this condition. As the merits of the question depended on points of English law, a joint case was made out for the opinion of English counsel; and an opinion having been given that the sellers had done every thing incumbent on them under the contract, the Court adhered to the Lord Ordinary's interlocutor decerning against Gairdner.

W. DICKSON, W. S.—M. BURD, W. S.—Agents.

Mrs. M. Hardie and Husband, Pursuers.—*Solicitor-General Hope—Moncreiff.*
L. Cauvin and Others, Trustees of R. Kay, Defenders.—*Cockburn—Lumsden.*

No. 190.

Feb. 12, 1823.

Second Division. Lord Cringletie. B.

Interest on Goods in Communion.—The Court, by a judgment of January 17, 1821, found Mrs. Hardie entitled, as executor of Mrs. Kay, (who had predeceased her husband), to one half of the goods in communion, at the dissolution of the marriage by her death, and remitted to the Lord Ordinary to ascertain the amount. Mrs. Hardie having claimed interest from and after the death of Mrs. Kay, the Lord Ordinary refused this, in respect that Mrs. Hardie had never made any claim for a share of the goods in communion, until after the death of Mr. Kay, who survived his wife several years, and found, 'that as interest on the share of the goods of communion is 'not constituted by any written obligation, neither 'is it due by law, that being a debt payable on demand, it can only be due *ex mora*, which could 'not arise until demand was made for payment; 'and, therefore, that interest on the share due to 'the pursuers of said goods in communion, is only 'due from the date of the citation to this action.' The Court altered this interlocutor, and found Mrs. Hardie entitled to the interest actually drawn from the fund by Mr. Kay, from the date of Mrs. Kay's death.

Pursuers Authorities.—8, Ersk. 3, 79; Fergusson, June 16, 1763, (541); Dawson, June 15, 1808, (F. C.)
Defenders Authority.—Lady Eccles, March 1686, (1767).

J. Pattison, Junior, W. S.—R. Stuart, W. S.—Agents.

No. 191. SIR W. C. FAIRLIE, Pursuer.—*Greenshields—Jeffrey.*
NEILSON and FULTON, Trustees of W. TAYLOR, Defenders.—*Moncreiff—Jameson.*

Feb. 12, 1823.
SECOND DIVISION.
Lord Cringletie.
B.

Landlord and Tenant.—This was a branch of the case, Vol. I, No. 257, (which see). The Court, after finding that Neilson and Fulton, trustees of Taylor, were liable for arrears of rent to Sir W. C. Fairlie, remitted to the Lord Ordinary to hear parties farther on a claim for credit made by them, for certain sequestrated effects. The Lord Ordinary held, that as it was stipulated by the lease that Sir W. C. Fairlie was, if he chose, entitled to take all the effects on the ground at the expiry of it, on a valuation, and that, as the trustees were bound by its terms, they were not entitled to credit for them. But the Court found, 'that the petitioners, (the trustees), are entitled to the value of the sequestrated effects, so far 'as the same were procured or purchased by them, 'and left by them on the premises.'

J. GEMMELL—A. MILLAR, W. S.—Agents.

No. 192. WRITERS to the SIGNET, Pursuers.—*Solicitor-General Hope—Clerk—Cranstoun—Moncreiff.*
J. GRAHAM, W. S. Defender.—*Forsyth—Jeffrey—Sandford.*

Feb. 13, 1823.
FIRST DIVISION.
Lord Alloway.
H.

Writers to the Signet—Corporation.—By the regulations of the Writers to the Signet, it is enacted, that 'no Clerk to the Signet shall own or acknowledge any person as his apprentice or clerk, but 'such only as, in very deed and truth, without fraud 'and collusion, is his real actual apprentice or his 'clerk, and actually attending and writing in his

'chamber,' nor 'subscribe any bills, summonses, 'letters, signatures, precepts, services before the 'macers, or other writs peculiar to the Clerks to the 'Signet, but such as are drawn or written by themselves, or their actual apprentices or clerks, by their 'directions, except when they sign for an absent 'brother, as before directed, and except bills of advocation and suspension, and all ordinary summonses which do not pass upon bills:' That 'every 'Clerk to the Signet shall take the full fees by law 'established, and no less, for signing letters and 'other writs peculiar to his office, except such signet 'letters as, being signed by one of the ordinary 'writers for the poor, are to be gratis:' 'That no 'Clerk to the Signet shall make any paction or bargain with any person or persons whomsoever, directly or indirectly, to subscribe any bills, letters, 'or other writs peculiar to the Clerks to the Signet, 'for less prices than those by law established, and 'shall not give back any part thereof, either by way 'of gratification, or any other manner of way, which 'may elude the true intent and meaning of these regulations.' And that, 'in case any Clerk to the 'Signet shall transgress or contravene any of the preceding regulations in this chapter, he shall, for the 'first offence, pay £5 sterling to the Treasurer of the 'Society, for the use of the poor; and, for every subsequent offence, shall be suspended from his office.' It is also declared, that, 'For proof of all violations of any 'of the acts and regulations of the Society, it shall be 'lawful to the procurator-fiscal, in all complaints, 'when other probation is wanted, to refer the same 'to the delinquent's oath; and if the delinquent, being personally apprehended, and cited by the officer

'to compear before the commissioners to answer to 'a complaint, shall fail to compear; or, if he shall 'compear, and shall refuse to depone, and purge 'himself by oath, he shall be holden as confessed, 'and the complaint shall be sustained in the same 'way as if it were proven by writing or witnesses.' Graham was admitted a writer to the signet, and, by the terms of his commission from the Keeper, he was bound to obey all the rules of the Society. He, accordingly, signed them, and took the oath, de fideli, like all the other members. A complaint was presented against him by the procurator-fiscal to the commissioners, accusing him of a violation of the rules, by signeting letters written by persons not his clerks, and taking fees below the fixed rate, and concluding for a fine of £5. Graham declined their jurisdiction, and refused, on a reference to his oath, to depone. The commissioners held him as confessed, fined him in £5, and certified, that, in case of a repetition of the offence, they would suspend or deprive him of his office. He resisted payment, and an action was thereupon raised against him, in name of the Keeper and other officers of the corporation of Writers to the Signet, concluding, to have it found, that the sentence of the commissioners was legal, and for decree conform to it; and, in the event of any future contravention of the rules of the corporation, that they had power, either to suspend him from his office, or to deprive him of it. Graham, in defence, maintained, 1. That the Writers to the Signet were not a corporation, and, therefore, had no title to pursue; 2. That they had no judicial powers; 3. That the rules merely prevented the exaction of fees beyond a certain maximum, and did

not fix any minimum; 4. That the sentence was illegal, as a reference to oath was not a competent mode of proof to convict in an offence, and punish by fine; and, 5. That he held his commission for life. The Lord Ordinary at first repelled the objection to the title; but afterwards reported the whole case. The Court decerned in terms of the libel.

The Judges were agreed, that, although the Writers had no incorporating charter, yet they had enjoyed all the privileges for such a length of time, and had been so often recognised by the Court as a corporation, that they were now completely vested with that right. But, it was observed, that, at all events, as Graham had bound himself to obey their rules, he could not object to the proceedings of the Commissioners.

Pursuers Authorities.—(1.)—4. St. 3, 32; 2. Bankt. 494–495; 1. Bankt. 49, § 18; 1. Ersk. 7, 64; 1. Bankt. 51, § 27; 1. Kyd on Corp. 97–103–384; 2. Kyd, 50 to 62; Feuars of Kelso, Jan. 8, 1755, (1380); Tailors of Perth, Dec. 10, 1756, (1974); Pro. F. of Paisley, Feb. 17, 1761, (1956); Lawson, Aug. 5. 1768, (1965); Tailors of Potterrow, Jan. 26, 1776, (7709).

Defender's Authorities.—(1.)—Madox, p. 26–27–29–192 1. Kyd, 39–41–44; Skirving, Jan. 19, 1803, (10921); 1. Craig, 163; 1. Bankt. 2, 49; 1. Ersk. 7, β4; 1. Blackst. 467; Kyd, 13; Masons of Lanark, June 11, 1730, (14554); Crawford, June 13, 1761, (14555); Pro. F. of Aberdeen, Dec. 15, 1762, (1961).—(4.)—2. Kyd, 112; Tomlins, Dict. *voce* Bye-Laws.—(5.)—Hogg, Dec. 1681, (13106); Duff, Feb. 20, 1799, (9576).

M'Kenzie & Sharp, W. S.—D. Fisher,—Agents.

Mrs. M'Lachlan, Claimant.— J. K. Campbell, W. S. Common Agent in the Ranking of Barmolloch.—*M'Neill.*

No. 193.

Feb. 13, 1823.

Second Division. Lord Pitmilly. B.

Husband and Wife—Competition.—In the ranking of the estate of Barmolloch, (of about £300 yearly rental), the property of Campbell, deceased, a claim

was lodged by Mrs. M'Lachlan, his relict, for certain provisions under an antenuptial contract, (especially an annuity of £150), which were objected to by the common agent, on the ground, that Campbell was insolvent at the date of the marriage. The Lord Ordinary, while he remitted to the common agent to enquire into the state of Campbell's affairs at the date of the marriage, found 'Mrs. M'Lachlan, in the meantime, 'entitled to be ranked according to the order of her 'preference, for an annuity of £100 yearly, from the 'first term after the death of the common debtor.' The common agent petitioned against this interlocutor; but his petition was refused, without answers.

CAMPBELL & CLASON, W. S.—D. M'LEAN, W. S.—Agents.

No. 194.

EARL of BREADALBANE, and R. CAMPBELL, Suspenders.—*Jardine—M'Neill.*
REV. W. FRASER, Charger.—*Sir J. Connell—A. Connell.*

Feb. 13, 1823.

SECOND DIVISION. Lord Pitmilly. M'K.

Teinds—Process—A. S. Nov. 26, 1718.—The Reverend Mr. Fraser, minister of the parish of Kilchrenan, in Argyleshire, having agreed to accept payment of his victual stipend, (which was payable 'between 'Yule and Candlemas'), in money, charged Lord Breadalbane and Campbell, two of his heritors, for his teind-meal for crop 1815, at 24s. per boll. They suspended, on the plea, that they were only liable to pay according to the market price of Inverary, which was the nearest market town, (there being no proper meal market in the parish), and offered to prove, that, on Candlemas-day 1816, the medium price of meal there, was only 20s. The Lord Ordi-

nary found, that 'the suspenders are liable to the 'charger in payment of the victual stipend due to 'him, at the medium market price in the town of 'Inverary on the 2d day of February 1816;' and, 'in respect the charger does not offer any proof in 'opposition to the suspenders' averment,' that the medium price of meal on that day was 20s. per boll, his Lordship found the letters orderly proceeded to that extent; but suspended simpliciter quoad ultra. The minister petitioned; but the Court adhered. On a reclaiming petition, they allowed a proof, from which it appeared, that, although the medium price of meal in Inverary market had been as high as 24s. between Yule and Candlemas, it was only 20s. on Candlemas-day. On considering this proof, and memorials thereon, the Court again, (by a majority), adhered to the Lord Ordinary's interlocutor. The minister presented a third reclaiming petition, which, he maintained, was competent, as a proof had been taken subsequently to the former interlocutor. To this it was answered, that the Court had adhered to the Lord Ordinary's interlocutor by two consecutive judgments, and, therefore, a third petition was incompetent. The Court dismissed it as incompetent.

Suspenders' Authorities.—(Competency.)—Shillinglaw, June 29, 1810, (F.C.); Lady Grey, June 11, 1811, (F. C.); Haig, &c. May 26, 1812, (F. C.)
Charger's Authority.—(Competency.)—Campbell, Jan. 24, 1822, (Ante, Vol. I, No. 308).

R. M'Kenzie, W. S.—M'Ritchie & Murray, W. S.—Agents.

No. 195. E. BEATTIE, Pursuer.—
H. LEE, Defender.—*Ro. Thomson.*

Feb. 14, 1823.
FIRST DIVISION.
Lord Alloway.
D.

Citation—In an action at the instance of Beattie, against Lee, two objections were taken by the defender, 1. That the citation served upon him had not been signed by witnesses, in terms of the act 1686, c. 4.; and, 2. That no witnesses were present, as alleged in the execution, of which he brought a reduction-improbation. The Lord Ordinary repelled the objection 'founded on the statute 1686,' and, as to the other point, reserved to Lee to proceed with his reduction. The Court refused a petition, without answers.

Defender's Authorities.—(1.)—1686, c. 4; 3. Ersk. 2, 17; 3. Ersk. (Prin.) 2, 61.—(2.)—1429, c. 112; 1540, c. 75; 1587, c. 86; 1681, c. 5, 1686, c. 4; Crawford, June, 27, 1624, (3108); Dickson, July 22, 1626, (Ibid.); Warrock, July 19, 1678, (686); Baillie, March 2, 1790, (11286); Campbell, Jan. 18, 1799, (11220).

S. F. M'INTOSH, W. S.—CAMPBELL & BURNSIDE, W. S.—Agents.

No. 196. W. CUNINGHAM and Cautioners, Suspenders.—
D. M'Farlane.
ELLEGOOD and SMYTH, Chargers.—*Skene.*

Feb. 14, 1823.
SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.

Bankrupt—Composition.—Cuningham having been sequestrated, offered a composition, which was accepted. A claim to a large amount had been lodged by Ellegood and Smyth, as the balance of accounts due by Cuningham, in a concern in which they were partners with him, but they produced no vouchers, nor the books of the concern, which were in their possession, and Cuningham denied the debt.

They having given a charge on the composition-

bond granted by Cuningham, he and his cautioners suspended. The Lord Ordinary refused the bill; but the Court passed it, caution having been offered at the bar.

THOS. JOHNSTONE—M'MILLAN & GRANT, W. S.—Agents.

J. M'NAUGHT, Pursuer.—*Maitland.* No. 197.
J. NAPIER, Defender.—*Christison.*

Feb. 15, 1823.

FIRST DIVISION.
H.

Cessio.—M'Naught raised a process of cessio, which was opposed by Napier, (to whom he was indebted for large arrears of rent), on the ground, 1. That he had fraudulently, and in contemplation of his bankruptcy, converted all his effects into cash, and paid it away to favourite creditors, and particularly to his father and near relations; and, 2. That he had not accounted satisfactorily for the disposal of his property. The Court refused the cessio.

Pursuer's Authorities.—(1.)—Thom, Feb. 11, 1809, (F. C.); Likely, Feb. 6, 1813, (F. C.)
Defender's Authorities.—(1.)—Lang, May 24, 1821, (Ante, Vol. 1, No. 27); Johnston, March 5, 1822, (Ibid. No. 427); Forman, (Ibid. No. 610).

A. BLAIR, W. S.—W. RENNY, W. S.—Agents.

G. SANDY and Others, Advocators.—*Cockburn—Brownlee.* No. 198.
G. INNES and Others, Respondents.—*More.*

Feb. 15, 1823.

SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
B.

Common Property.—Sandy and others were proprietors of the upper flat and attics of a tenement in James's Square, Edinburgh, forming one dwelling-house. The access to the flat was by means of a common stair, and

that to the attics by a stair in the inside of the flat. Sandy, &c. proposed to prolong the common stair, so as to afford an entry from it to the attics, and thereby to convert them into separate dwellings. Innes and others, proprietors of the inferior flats, applied to the Sheriff for an interdict, which was granted. Sandy, &c. presented a bill of advocation, which the Lord Ordinary refused; but the Court, while they continued the interdict, passed the bill to try the question.

D. MACGOWN—JAS. POTT, W. S.—Agents.

No. 199. Mrs. J. JOHNSTONE and Others, (Hannay's Trustees,) Petitioners.—*A. Bell.*
J. VANS AGNEW, Respondent.—*Jeffrey*—*P. Robertson.*

Feb. 15, 1823

SECOND DIVISION. M'K.

Inhibition.—Agnew executed an inhibition against the petitioners, trustees of the late Mr. Hannay. In the will of the letters, they were inhibited qua trustees; but the terms of the letters themselves were ambiguous, and might be construed to be directed against them personally. The copy served on them did not contain the will; and they, therefore, applied for a recal, on the ground that they had been personally inhibited. To this it was answered, that the record shewed, that the inhibition was used against them only as trustees. The Court recalled the inhibition, and found Agnew liable in expences.

W. DICKSON, W. S.—J. S. ROBERTSON, W. S.—Agents.

EARL of STRATHMORE and MANDATORY, Suspenders. —*Baird.*
W. LANG, Charger.—*Rutherfurd.*

No. 200.

Feb. 18, 1823.

FIRST DIVISION.
Lord Alloway.
D.

Palace—Poinding.—The bill of suspension, noticed ante, Vol. I, No. 169, having been passed, to try the question, whether it is legal to execute a poinding of a debtor's effects situated within the Palace of Holyroodhouse, with concurrence of the bailie of the sanctuary; the Lord Ordinary found the letters orderly proceeded, in respect, 'that there is no precedent 'for the sanctuary of Holyroodhouse, or for the Pa- 'lace, affording any protection to the effects of debt- 'ors residing therein, so as to relieve them from 'poinding; that the suspender's reasoning could ap- 'ply only to the Sovereign's residence in the Palace, 'whose presence ought not to be disturbed by the 'intrusion of persons into the Palace without his 'permission, or that of the keeper appointed by him; 'and that the diligence in question, was authorized 'by the baron-bailie of the Abbey, the officer ap- 'pointed by the hereditary keeper of the Palace.' The Court unanimously adhered.

Suspenders Authorities.—1. Ross, 331, 336, 144; Dirleton, No. 127; 3. Coke, 45, p. 140; 2. Raym. Rep. 978; 1. Camp. Rep. 475; Chitty, on Prerog. c. 14.

Charger's Authorities.—4. Bankt. 39, 1; 4. Ersk. 3, 25; 3. Coke, p. 140; 1593, c. 173; Holt's Rep. 591; 10. East. 577.

J. HAMILTON, W. S.—A. STEELE, W. S.—Agents.

No. 201. J. CRAIG and Others, Pursuers.—*Jeffrey—More.*
Rev. Mr. MUCKERSY and Others, Defenders.—*Moncreiff—Forsyth—Tawse.*

Feb. 18, 1823.

SECOND DIVISION. Lord Pitmilly. B.

Clause—Lease.—The late Mr. Muckersy, minister of the Associate or Antiburgher Congregation at Kinkell, granted a long lease of a house and ground belonging to him, to certain persons 'elected managers of the affairs of the congregation,' and their successors and assignees, who were always to be 'elders of this Associate Congregation, continuing to 'profess, espouse, and maintain the principles of the 'Antiburgher Associate Synod.' The purpose of the lease was declared to be, by a relative bond executed by the tacksmen, that the subjects, after Mr. Muckersy's death, should be possessed 'by a minister 'to be settled in the said congregation, who shall 'always be a member of the said Antiburgher Associate Synod, and of the same profession and principles with them;' and, it was farther declared, that, 'failing such minister or congregation, or any 'one of them, the whole subjects set, being the undoubted property of the said Mr. John Muckersy, 'he, his heirs, successors, and assignees whatsoever, 'shall, ipso facto, have summary access thereto, as 'their own proper heritage, without any order of 'warning, process of removal, or other declarator 'of law to be used for that effect.' After Mr. Muckersy's death, the congregation elected Mr. Imrie to be their minister, who possessed the subjects let for several years, but having been excommunicated and deposed by the Associate Synod for certain heretical opinions entertained by him, he, in 1814, renounced

and ceded possession of the premises to Mr. Muckersy's representatives, who immediately entered thereto. As the greater part of the congregation adhered to Mr. Imrie, the minority, (who continued attached to the principles of the Antiburgher Synod), neither appointed any minister nor made any claim under the lease till 1818, when, having elected a minister, the assignees of the original tacksmen raised this action, to have Mr. Muckersy's representatives removed from the premises, and their own right to them declared. It was pleaded, in defence, that the lease had fallen by the failure of a minister and congregation in 1814: and the Lord Ordinary found, 'that 'the pursuers having allowed the lease to be put an 'end to, and the representatives of the granter to re-'cover and hold possession for four years, are not 'entitled to attempt to renew and revive the lease 'by the present action,' and assoilzied the defenders. The Court altered this interlocutor, and decerned in terms of the libel; but (the minister having, by this time, resigned), they, of consent, prorogated the term of removal till the induction of a clergyman.

Pursuers Authority.—2. Ersk. 5, 25.
Defenders Authority.—Taylor, Nov. 28, 1728, (15310).

W. & A. G. Ellis, W. S.—Chas. Tawse, W. S.—Agents.

E. Beattie, Suspender.—*Jeffrey—Graham Bell.*
J. Haliburton, Charger.—*Cockburn—Bruce.*

No. 202.

Bill of Exchange—Vitiation.—Haliburton charged Beattie, as drawer and indorser of a bill of exchange which bore to be payable 'at the Leith Company's 'Banking Office, Dalkeith.' Beattie suspended, and

Feb. 18, 1823.

Second Division.
Lord Pitmilly.
M'K.

pleaded,—1. That the bill was vitiated, the word 'Leith' being evidently written on an erasure; and, 2. That a partial payment had been made to Haliburton by Brown, the acceptor of the bill. It appeared that there were only two banking offices in Dalkeith,—the 'Leith' and the 'Commercial Company,'—and it was not alleged, that the bill had been originally drawn payable at the Commercial Banking Company's Office. The Lord Ordinary repelled the reasons of suspension, and found the letters orderly proceeded; and the Court (after being equally divided, and having called in the Ordinary) adhered to his Lordship's interlocutor, in so far as it repelled the reasons of suspension founded on the vitiation; but remitted to hear, quoad ultra.

Suspender's Authorities.—2. Bell, 352; Minchie, July 1795, (1458); Bryce, Nov. 16, 1810, (F. C.); Callender, Dec. 10, 1812, (F. C.); Tidmarsh v. Groves, 1. Maule and Sel. 735; Cowie v. Hasewell, 4. Barn. and Ald. 197.
Charger's Authorities.—Chitty, 118-9; Henderson, Feb. 20, 1802, (17059); Milne, Jan. 16, 1810, (F. C.)

W. Lang, W. S.—Tait & Bruce, W. S.—Agents.

No. 203.

J. Stuart.—*Bell—Marshall.*
A. Douglas, Common Agent in Ranking of Parkhall.—*M'Neill.*
Competing.

Feb. 20, 1823.

First Division.
Lord Meadowbank.
D.

Triennial Prescription—Personal Objection—Factor Loco Tutoris.—Livingstone of Parkhall died on the 29th of June 1815, insolvent; and Lockhart was appointed factor loco tutoris to his minor children. A meeting of his creditors was held on the 14th April 1817, after being called by public advertisement, and was attended by Lockhart. The creditors

present resolved to supersede legal measures, and to request the absent creditors to join in a general assignation of their debts to Stuart, in trust, in order to obtain a decree of constitution, and save expence. This was communicated to all the creditors by letters, and, at a subsequent meeting, the resolution was adopted. An assignation by the greater number of the creditors was executed, on which an action was raised on 10th June 1818, and decree of constitution in absence was pronounced on the 29th of the same month. A ranking and sale of Parkhall having been brought, three classes of personal creditors claimed to be ranked,—1. One who had attended the meeting in April 1817, but whose claims had then incurred the triennial prescription; 2. Another who were also present, and whose claims were not then prescribed, but were so before the decree of constitution; and, 3. Another, consisting of those creditors who did not appear at the meeting, and whose debts were not prescribed. Douglas, the common agent, objected, that the two first classes were not entitled to be ranked. To this it was answered,—1. That the debts were constituted by the decree against the representatives of the debtor, who were farther barred from pleading the defence by the presence of the factor loco tutoris, at the meeting; and, 2. That the absent creditors having been in the full knowledge of the proceedings, were also barred, personali exceptione, from urging this plea. The Lord Ordinary found, 'that, from the circumstance of Mr. Lock-'hart's attendance as factor loco tutoris for the child-'ren of the late Alexander Livingstone at the meet-'ing of the creditors, and acquiescing in the general 'measures agreed to be followed, the representatives of

'the said Alexander Livingstone are barred, personali 'exceptione, from pleading prescription against the 'claims of those creditors who attended said meetings, 'either by themselves or their mandatories, or agents, 'or who, in obedience to the resolutions and recom- 'mendations of the creditors at the said meetings, 'assigned their claims to Mr. Stuart, as trustee for 'their behoof, and have got their claims constituted 'in his person, and whose debts were not prescribed 'at the date of the first of these meetings: that the 'personal creditors who so attended said meetings, 'and whose debts were not prescribed at the date of 'the said first meeting, or who assented to the reso- 'lutions thereof, are in like manner barred, personali 'exceptione, from pleading prescription. But, in so 'far as regards the creditors who neither attended 'the said meetings, nor assented to the resolutions 'adopted thereat, and whose debts have not suffered 'prescription, finds they are entitled to be ranked 'and draw dividends in the same manner as if pre- 'scription of the claims of those creditors who at- 'tended these meetings had not been interrupted; 'sustains the plea of prescription against the claims 'of those creditors whose debts were prescribed at 'the first meeting of creditors in April 1817.' The Court, (23d November 1822), adhered, 'in so far as 'relates to these creditors whose debts had suffered 'prescription by the elapse of three years from the 'date of the last article thereof, at and prior to the 'meeting of the creditors in April 1817;' but appointed memorials quoad ultra, on advising which, they repelled the plea of prescription as to those creditors whose debts were not prescribed at the above date, and remitted to proceed accordingly.

Stuart's Authorities.—1. Bell, 253; Alton, July 1, 1800, (Ap. Property, No. 5); Alton, May 19, 1801, (Ibid. No. 6); E. of Kinnoul, Jan. 18, 1814, (F. C.); Lang, June 29, 1813, (F. C.); M. of Abercorn, May 20, 1820, (F. C.); 2. Bell, 592, and cases there; Leslie, Nov. 15, 1808, (F. C.); 1. Bell, 253; A. S. Feb. 13, 1730, § 6; Mackay, Mar. 9, 1796, (16384); Brown, June 17, 1758, (16359); Falconer, Feb. 17, 1792, (16380); 1. Ersk. 7, 18.

Douglas's Authorities.—1. Bell, 252–253.

LINNING & NIVEN, W. S.—A. DOUGLAS, W. S.—Agents.

J. JOHNSTONE and Cautioners, Suspenders.—*Rutherfurd.*
J. CARSON, Charger.—*Boswell.*

No. 204.

Feb. 20, 1823.

FIRST DIVISION.
Lord Meadowbank.
D.

Condition—Composition-Contract.—Johnstone offered a composition to his creditors, 'on condition only 'that all the creditors agree to it, and grant a discharge in full.' This offer was accepted of at a meeting of the creditors, and a minute was signed by those present, among whom was Carson. He afterwards charged Johnstone for full payment of his debt, alleging, that all the creditors had not acceded, and that many of them had been paid in full. Johnstone suspended; but the Lord Ordinary and the Court being satisfied, that the condition of the contract had not been observed, found the letters orderly proceeded.

Charger's Authority.—2. Bell, 596.

W. RENNY, W. S.—H. CANNAN, W. S.—Agents.

No. 205. P. FARQUHARSON, and Others.—*Forsyth—Jeffrey—Rutherfurd.*
GENERAL KING.—*Cockburn—Cuninghame.*
Competing.

Feb. 20, 1823.
FIRST DIVISION.
Lord Alloway.
D.

Executor—Expences.—The late Mrs. Munro appointed Farquharson, and others, her executors, by a will, in which she bequeathed various legacies, and named General King to be her residuary legatee. In a process of multiplepoinding raised by the executors for the payment and division of the executry, and for exoneration, the Lord Ordinary, after various proceedings, ordained them to consign, in a bank, the funds in their hands, and to lodge all the vouchers of debts, &c. with the clerk of process, subject to the orders of the Court; and found them liable in expences. They reclaimed, and pleaded, that they were not bound to part with the funds and documents until discharged. The Court adhered; and, in respect of their litigious conduct, found them liable, personally, in expences.

A. STEELE, W. S.—*Æ.* M'BEAN, W. S.—Agents.

No. 206. HUGHES & DUNCAN, Pursuers.—*Jardine.*
D. GORDON, Defender.—*A. Bell.*
M. HYSLOP, Defender.—*M'Neill.*

Feb. 20, 1823.
SECOND DIVISION.
Lord Bannatyne.
M'K.

Condictio Indebiti.—Hyslop, who was then in New York, wrote, in 1805, to Rathbone Hughes and Duncan, of Liverpool, (of which house, the pursuers were the surviving partners), in these terms.—'Having, a 'few days since, apprised you, that I had ordered my 'attorney in Scotland, to place in your hands what-

'ever money he may receive, on my account, from 'the estate of my deceased father, (situated in Scot-'land), I have now to request, that you will honour 'the bills of my brother-in-law, Mr. David Gordon, 'of this place, to the amount that may be at my credit 'with you, from the above sum.' And he, thereafter, wrote to Gordon himself, to whom he was indebted, as follows.—'I have given a letter to Messrs. 'Rathbone Hughes and Duncan, of Liverpool, au-'thorizing them to honour your bills to the amount 'of whatever property they may receive from Scot-'land on my account, by way of collateral security, 'or as a convenience to you.' In 1808, Hyslop drew on the above company for £400, which he ordered them to pay out of his Scotch funds; and, as they had not yet received any of them, he desired his attorney in Scotland, instantly to remit to the extent of the bill to them, which he accordingly did. Rathbone Hughes and Duncan paid the bill; and soon thereafter, Gordon insisted for, and received payment from them of £400, under the letter in 1805. An action of repetition and relief, against Hyslop and Gordon, was then raised by the pursuers. Hyslop contended, that he was entitled, at any time, to alter the destination of his funds; and Gordon, that this fund having been appropriated for his behoof, Rathbone Hughes and Duncan ought not to have applied it in payment of Hyslop's subsequent order. The Lord Ordinary having reported the case, the Court assoilzied Hyslop, and decerned against Gordon, reserving to him all claims against Hyslop.

W. Dickson, W. S.—Vans Hathorn, W. S.—J. Thorburn,—Agents.

No. 207. J. CUNINGHAME, Pursuer.—*Clerk—Fullerton.*
R. CUNINGHAME, Defender.—*Cockburn—Ivory.*

Feb. 20, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

Personal Objection.—In 1762, Erskine of Balgownie executed an entail of his estate, including certain separate subjects near Culross, containing prohibitory and irritant (but no resolutive) clauses, against selling or altering the succession, or holding by any other title. On his death, he was succeeded by his nephew, Robert Cuninghame, who made up titles under the entail, except to the Culross subjects, which he took in fee-simple. In 1792, Mr. Cuninghame executed a new and strict entail of Balgownie, similar in its terms and destination to that of Mr. Erskine, but containing additional prohibitive and resolutive clauses, and including a small pendicle of ground, which he had purchased. He afterwards, also, entailed the Culross subjects along with a subsequent purchase; and obtained from his son a ratification of these deeds, in consideration of which, he discharged certain debts due to himself under Mr. Erskine's settlement, and affecting Balgownie. On his death, his son made up titles under the new entails; and he having died, leaving a son, the pursuer, a minor, his curators made up titles for him under the same entails. After he came of age, the pursuer claimed enrolment as a freeholder in Stirlingshire, and possessed the several properties in virtue of these titles. Thereafter, and within the quadrennium utile, he raised this action of reduction, as heir under Mr. Erskine's entail of 1762, to have the strict entails executed by his grandfather, Mr. Cuninghame, set aside. Robert Cuninghame, (a substitute in the entails under reduction), appeared as a defender, and

pleaded, that the pursuer's title was barred, personali exceptione; 1. As benefited by the discharge of the debts affecting the estate under Mr. Erskine's entail; 2. By homologation,—having possessed, and claimed enrolment, in virtue of the deeds sought to be reduced; and, 3. Gestione pro herede, in having taken up, under the entails, the subjects which had been purchased by his grandfather, and thereby incurring a representation, both of him and his father, who had ratified the entails. The Lord Ordinary found, that the pursuer is 'barred, 'personali exceptione, from insisting in this pro-'cess, for setting aside the entail executed by his 'said grandfather, and ratified by his father, and as-'soilzied the defenders.' The Court adhered.

The Lord Ordinary proceeded in his interlocutor, on the ground of the pursuer being benefited by the discharge of the debts affecting the entailed estate; but the Court rested their judgment on homologation, and gestio pro herede, and chiefly on the latter ground.

Pursuer's Authorities.—Macgil, Nov. 22, 1664, (5696); Chalmers, Feb. 27, 1666, (5696); Jack, July 14, 1669, (5696); Archbishop of St. Andrew's, March 12, 1684, (5699); Home, Jan. 1734, (5700).

Defender's Authorities.—1. Ersk. 7, 39; Anderson, July 15, 1760, (5701); Cuninghame, Jan. 17, 1758, (617); Gibson, June 20, 1786, (620); Fordyce, Dec. 14, 1743, (5700); Montgomery, Feb. 23, 1666, (5619); Linton, Jan. 1729, (5624); Rires, Jan. 1663, (5619).

GIBSON & OLIPHANT, W. S.—TOD & ROMANES, W. S.—Agents.

No. 208. LORD GLAMMIS, Pursuer.—*Cockburn—Skene—A. Wood.*
EARL of STRATHMORE'S TRUSTEES, Defenders.—*Cranstoun—Thomson—Fullerton—Moncreiff.*

Feb. 21, 1823.
FIRST DIVISION.
H.

Aliment—Stat. 1491, *c.* 25.—The late Earl of Strathmore, after executing a deed of entail, and relative trust-disposition, of his whole estates, died without lawful issue. He was succeeded in his titles by his younger brother, the present Earl, who was entirely excluded from the succession to the estates, which were destined to a series of heirs. To these estates, Lord Glammis, the eldest son of the present Earl, acquired right, as heir of entail, and was, as such, infeft, under burden of the provisions of the trust-deed. By that deed, the whole estates were conveyed to the defenders for various purposes, and, particularly, to draw the whole rents and profits for the space of thirty years, and to accumulate them for the benefit of the then existing heir of entail. The effect of this being to deprive Lord Glammis, in the meanwhile, of any income from these estates, he brought an action of aliment against the trustees, on the ground, 1. That, being fiar of the estates, and the trustees being vested in the beneficial possession of them, they were in the situation of liferenters, and so bound under the statute 1491, c. 25, to aliment him; and, 2. That, as his grandfather was obliged, jure naturæ, to aliment him, and, as the late Earl was his eldest son and heir, this burden descended against him, jure representationis. Against this action, the trustees pleaded, 1. That they were not liferenters, but were vested with the estates in trust, under burden of which, Lord Glammis had succeed-

ed as heir of entail, and that the act 1491, c. 25, was not applicable to such a case; and, 2. That he was not only major, enjoyed an income, and was not born during the life of his grandfather, but his father, (through whom alone he could claim), had received a suitable provision, and discharged the late Earl. The Court, after a hearing in presence, and advising memorials, assoilzied the trustees.

Pursuer's Authorities.—(1.)—Creditors of Edinglassie, July 15, 1707, (16446); 1491, c. 25; 2. Craig, 355; Hamilton, July 16, 1667, (382); Whytford, 1619, (386); Hamilton, Feb. 7, 1682, (387); Ayton, July 25, 1705, (390); Finnie, Feb. 22, 1631, (393); L. of Kirkland, Nov. 27, 1685, (401); Cuninghame, July 12, 1715, (405); Ford, Feb. 1722, (396); Bell. 237; M'Kenzie, Ob.; 2. Erak. 9, 62.—(2.)—Ayton, July 25, 1705, (390); Douglas, Feb. 8, 1739, (425); Dalziell, Dec. 14, 1788, (450); Cases in Mor. p. 415, 419, 422, 424, 431, 435, Ap. Alim. Nos. 3 and 12.

Defenders Authorities.—(1.)—Bonar, Feb. 15, 1709, (395); Mirrie, July 1731, (397); Hamilton, July 7, 1729, (392); Stewart, June 24, 1780, (396).

G. Veitch, W. S.—R. S. Dundas, W. S.—Agents.

R. Murray, Pursuer.—*Jardine.*
J. Watson, Defender.—*G. Graham Bell.*

No. 209.

Cessio.—Decree of cessio was here opposed, on an allegation of concealment of funds; but, as it was perfectly vague, the Court decerned.

Feb. 21, 1822.

First Division.
D.

D. Brashe,—A. Smith,—Agents.

No. 210. COMMISSIONERS of SUPPLY of WIGTONSHIRE, Pursuers.—*Clerk—Greenshields.*
PARISHES of ST. QUIVOX, SORN, and OCHILTREE, Defenders.—*Jeffrey—Campbell—Jameson.*

Feb. 21, 1823.

SECOND DIVISION. Lord Pitmilly. B.

Poor—Criminal and Lunatic Pauper.—James Fisher was tried before the Circuit Court of Justiciary at Ayr, for theft committed within the county of Wigton, and a verdict was returned, 'finding 'the pannel guilty, but that he was subject to fits 'of insanity at the time of committing the theft.' The Court ordained him to be confined for life in Wigton jail, unless his friends should find security to keep him in safe custody. Fisher being a pauper, the county of Wigton advanced the sums necessary for his maintenance in jail, and in the Lunatic Asylum of Glasgow, to which he was removed by warrant of the High Court of Justiciary, on a joint application from the Magistrates of Wigton and the county, until he was liberated in virtue of a remission from the Crown. The county then raised this action of relief against the parish of St. Quivox, as the place of Fisher's birth, and those of Sorn and Ochiltree, as parishes where he had obtained a legal settlement, concluding for repayment from one or other of them, of the sums advanced for his maintenance. The Lord Ordinary assoilzied all the parishes; and the Court, (after having altered that judgment, and been equally divided), finally adhered to his Lordship's interlocutor.

Pursuers Authority.—Scott, July 9, 1818, (F. C.)

VANS HATHORN, W. S.—THOMSON & CAMPBELL, W. S.—HUNTER, CAMPBELL, & CATHCART, W. S.—Agents.

J. HAMILTON, Suspender.—*Clerk—Spiers.*
SIR W. M. NAPIER, Bart., and the JOHNSTONE ROAD-TRUSTEES, Chargers.—*Jeffrey—Cockburn—Maitland—Napier.*

No. 211.

Feb. 21, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

Public Road.—The Johnstone Road-Trustees having, by the unanimous resolutions of several meetings, and according to the provisions of the act 44. Geo. III, c. 52, determined to make a slight alteration on the Johnstone road, which increased its length by about sixty yards, Hamilton, a proprietor in the vicinity, suspended, alleging that the alteration injured the line of road. The Lord Ordinary repelled the reasons, and the Court, being of opinion that none of the suspender's averments called for their interference, adhered.

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. G. HOPKIRK, W. S.—Agents.

P. SPEIRS, Complainer.—*Clerk—Cuninghame—Spiers.*
J. BUCHANAN and Others, Respondents.—*Sir J. Connell—Blackwell—Hozier.*

No. 212.

Feb. 21, 1823.

SECOND DIVISION.
F.

Process—16. *Geo. II*, c. 11—*Expences.*—The freeholders of Dumbartonshire having, on the 19th July 1816, rejected a claim for enrolment on the part of Speirs, he complained to the Court. His petition was regularly boxed, and marked by a clerk of Session, on Tuesday the 19th of November thereafter, which was a Court day; but it was not moved in Court till the 21st. By the 16. Geo. II, c. 11, § 4, it is declared, that, where any claim for enrolment shall be refused, it shall be competent to

the claimant to apply to the Court of Session by summary complaint, 'so as such application be made 'within four calendar months after their being so 'refused,' &c. The four months had not expired on the 19th, but they had elapsed on the 21st. This was not observed till the litigation had gone on for a considerable period, when, at last, the respondents stated the objection, that the petition not having been presented to, nor moved in Court, till after the expiry of four months from the date of the rejection of the claim, it was incompetent. The Court ordered minutes on this objection, and thereafter dismissed the complaint 'as incompetent, not 'having been made within the time prescribed by 'the statute;' but found the respondents liable in the previous expences, and entitled to those incurred on the question of competency. A reclaiming petition against this award of expences, on the ground that it was incompetent, was given in by the respondents, which the Court, (while they held the petition to be competent), refused, without answers.

Complainer's Authorities.—Ramsay, Dec. 14, 1765; Wight, p. 337; Douglas, June 24, 1809, (F. C.); Bell on Election, 421-2; A. S. March 11, 1806, and March 11, 1814.

Respondents Authorities.—Wight, p. 133; Henderson, July 3, 1821, (Ante, Vol. 1, No. 125).

A. Monypenny, W. S.—Jas. Hill, W. S.—Agents.

No. 213. A. Ramsay, Petitioner.—*J. W. Dickson.*
J. Marshall, Respondent.—*Moncreiff—Brownlee.*

Feb. 22, 1823.

First Division.
D.

Process.—Stat. 48. *Geo. III, c.* 15.—In an action at the instance of Ramsay against Marshall, the Lord Ordinary pronounced decree of absolvitor, and

refused a representation by Ramsay, which had not been lodged within the reclaiming days, as incompetent. A debate then took place, as on a final cause, and expences were decerned for, and paid, to prevent extract. Ramsay afterwards presented a petition, under 48. Geo. III, c. 15, to be reponed against the absolvitor, alleging, that it had become final by mistake. The Court refused the petition.

P. Pearson,— Agents.

A. Clark and Others, Suspenders.—*T. H. Miller.* No. 214.
Bank of Scotland, Charger.—*Walker.*

Bill of Exchange.—This was a charge on bills accepted by Clark and others, as individuals; against which they presented a bill of suspension, on the ground, 1. That the bills had been granted by them, as trustees, and that they were not liable beyond the trust-estate; and, 2. That the original value consisted of certain forged bills, which had been discounted with the Bank. The Lord Ordinary and the Court, being satisfied that the reasons were unfounded, refused the bill.

Feb. 22, 1823.
First Division.
Bill-Chamber.
Lord Mackenzie.
H.

T. Walker,—H. Davidson, W. S.—Agents.

E. Clouson, (Geddes's Trustee), Pursuer.—*Skene.* No. 215.
A. Anderson, Defender.—*Fullerton.*

Fraud—1621, *c.* 18.—In 1819, Geddes, who was then insolvent, granted two dispositions of his heritable property to his brother-in-law, Anderson, ex facie, for a full price, instantly paid; and, immediately there-

Feb. 22, 1823.
First Division.
Lord Gillies.
H.

after, fled to England, where a commission of bankruptcy was issued against him; and, about the same time, a sequestration was awarded in Scotland. Clouson, as trustee on his sequestrated estate, raised an action of reduction of the dispositions, on the act 1621, against Anderson. His defence was, that he had paid £250 of the price in cash, and that the balance, being £2,000, was included in a bond payable to the wife and children of Geddes, who was bound by his contract of marriage to make this provision; and he contended, that, at all events, before the dispositions could be reduced, he was entitled to restitution of the money, and of the bond. The Lord Ordinary decerned in the reduction; and the Court being satisfied that this was a fraudulent and collusive transaction, adhered.

Pursuer's Authority.—1. Bell, 195.

J. G. Hopkirk, W. S.—J. M'Cook, W. S.—Agents.

No. 216.

J. M'Ilwham, Pursuer.—*Clerk*—*Forsyth.*
Hugh Kerr, Defender.—*Jeffrey*—*D. M'Farlane.*

Feb. 22, 1823.

Second Division. Lord Reston. B.

Bill of Exchange—Fraud—Reference to Oath.—This was an action of reduction, at M'Ilwham's instance, of a promissory-note granted by him to Kerr, on the ground that it had been impetrated from him by means of gross fraud and circumvention on the part of Kerr and his wife. A proof was allowed; from which it appeared, that the pursuer was a man of weak mind,—that he had had criminal intercourse with Kerr's wife,—that Kerr had connived at this intercourse, and, in collusion

with his wife, had impetrated this bill from the pursuer, as damages. The Court reduced and decerned in terms of the libel. Kerr reclaimed, and gave in a minute of reference, offering to instruct by the pursuer's oath, 'that the sum contained in the note or 'bill under reduction, is due, resting and owing him 'by the defender.' The Court refused to allow the reference.

D. FISHER,—JAS. GREIG, W. S.—Agents.

T. MORRISON, Advocator.—*Greenshields—Rutherfurd.* No. 217.
SIR D. H. BLAIR, Respondent.—*Cranstoun—Forbes.*

Feb. 22, 1823.

SECOND DIVISION.
Lord Pitmilly.
B.

Landlord and Tenant—Rent.—Morrison took a farm by missive of lease from Sir David H. Blair for seven years; and after having possessed for two years, a regular contract of lease was made, by which he bound himself to follow a particular mode of culture for every year of the tack, from which, if he deviated, he was to pay £5 of additional yearly rent for each acre cultivated differently; and 'which additional rent, (it was declared), 'shall not be considered as penal, but as pactional.' Morrison having complained, in the course of the following year, of the impossibility of introducing at once the mode of cultivation prescribed in the lease, Sir David sent him a scheme of cropping, in some respects different. Having deviated from both this and the stipulated mode, Sir David raised action before the Sheriff of Ayrshire for additional rent. Morrison pleaded, in defence, that the additional rent could not be transferred to the new scheme, as that prescribed in the lease had been abandoned by

Sir David; and, at any rate, that the additional rent was, in reality, a penalty, and, therefore, subject to an equitable modification. The Sheriff held, that 'the additional missive furnished by the landlord to 'the tenant, merely changed the rotation of crop-'ping, but left all the other stipulations and penal-'ties of the former tack unchanged, and applicable 'to the new rotation;' and he appointed two inspectors to ascertain the extent of land laboured contrary to that scheme, and, on their report, decerned against Morrison for the additional rent effeiring thereto. Morrison advocated, but the Lord Ordinary remitted, simpliciter, and the Court adhered.

Advocator's Authorities.—Muir M'Kenzie, June 18, 1811, (F. C.); Wortley M'Kenzie, Dec. 13, 1811, (F. C.)

Respondent's Authorities.—Grahame, May 11, 1789, (F. C.); Henderson, Feb. 24, 1802, (10054); Fraser, Feb. 26, 1813, (F. C.)

A. CRAUFURD, W. S.—J. BELL, W. S.—Agents.

No. 218.

A. SANDIESON, Suspender.—*Lumsden.*
F. FARQUHARSON, Charger.—*Hutcheson.*

Feb. 25, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Bill of Exchange.—This was a question, whether or not Farquharson was a bona fide holder of a bill; and, in a suspension, a reference having been made to his oath, the Lord Ordinary and the Court found, that he was not; and, therefore, suspended the letters.

W. DUTHIE, W. S.—A. STEELE, W. S.—Agents.

J. LEISHMAN, Pursuer.—*J. W. Dickson.* No. 219.
J. THOMSON and Others, Defenders.—*Neaves.*

Expences.—In this case the Lord Ordinary, in consideration of the whole circumstances, had found expences due to neither party. Both reclaimed, but the Court adhered.

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SECOND DIVISION.
Lord Pitmilly.
M'K.

M. PATTISON,—GREIG & PEDDIE, W. S.—Agents.

D. CRAWFORD, Suspender.—*Jeffrey—Matheson.* No. 220.
Mrs. B. MUNRO, (Executrix of G. MUNRO), Charger.
—*Skene—P. Robertson.*

Proof—Payment of Money.—Crawford, a merchant in Dingwall, being indebted to Forbes and Company of Aberdeen, the sum of £20, transmitted the amount to a bank in Inverness, to await their orders. Before Forbes and Company were apprised of this, they had authorized Munro, a writer in Dingwall, to receive payment for them; and Crawford, therefore, wrote to the bank to send back the money to him. This not being immediately complied with, he, on the 20th of March, gave Munro an order on the bank for the £20, who, on the 29th March, wrote to Forbes and Company,—'I received the £20 from 'Mr. Crawford, which waits your order.' Munro, who, at the date of this letter, was confined to bed, died shortly thereafter, and the order on the bank, given him by Crawford, was found in his pocket. Mrs. Munro, his widow and executrix, having obtained

Feb. 25, 1823.
SECOND DIVISION.
Lord Cringletie.
F.

decreet in absence, against Crawford, on this order, charged thereon. Crawford suspended, and offered to prove, by parole evidence, that, on the 23d of March, (after he had given the order to Munro, and six days prior to the date of Munro's letter to Forbes and Company), having then received the £20 back from Inverness, he delivered the same to a servant of Munro's, who gave it to Munro himself, he being then confined to bed. The Lord Ordinary found the letters orderly proceeded; but the Court, in the very peculiar circumstances of this case, allowed a proof, which established the truth of Crawford's allegations; and they, therefore, suspended the letters.

M'Queen & M'Intosh, W. S.—T. M'Kenzie, W. S.—Agents.

No. 221.

A. Renton, Advocator.—*Forsyth—Buchanan.*
J. Younger, Respondent.—*Walker.*

Feb. 26, 1823.

First Division. Lord Alloway. D.

Tack—Entry.—Several weeks prior to Whitsunday 1820, Renton obtained possession, as tenant, for a year, of a house, and adjacent garden, situated within the town of Haddington. Younger became the tenant for the following year, and, after he had been allowed, at Candlemas, to plant some vegetables in the garden, a dispute arose between him and Renton, as to the term of his entry. Renton alleged, that the house and garden were let to him from Whitsunday to Whitsunday, as one possession, for the purposes of his trade, as a stocking-weaver; and Younger, that the garden was a separate subject, the entry to which was at Candlemas. In a process at Younger's instance, the magistrates found he was entitled to the garden at that term; and, in an advocation,

the Lord Ordinary repelled the reasons, 'in respect 'that the receipt founded on by the advocator bears, 'that it was for the rent of a house and garden, and, 'in respect of the practice of Scotland, by which 'Candlemas is the ordinary term of entry, and removal 'to and from gardens.' His Lordship afterwards refused a representation, on the ground, (as explained in a note). '1. That where an acre or piece of 'land passes as part and pertinent of a town-house, 'as in the case with the greens or back areas in 'Edinburgh, they must follow the term of entry to 'the house. 2. Where the cultivation of vegetables 'is usual, the term of entry must be before Whit-'sunday, before which time all vegetables must be 'planted or sown; and, therefore, the entry to the 'garden is held to be at Candlemas. 3. The ma-'gistrates ought certainly to have known what was 'the custom of their own burgh, and that the entry 'to a garden was at Candlemas. 4. The represent-'er admits, that he gave access to the garden for a 'week at Candlemas, and, it is alleged, that he ob-'tained possession of the garden, which he took 'when deprived of the one now in question at the 'time. 5. It is also alleged, that the representer 'obtained possession of the garden in question at 'the same time.' The Court adhered.

P. Crooks, W. S.—J. Gibson, Tertius, W. S.—Agents.

No. 222. R. CUNINGHAME, Suspender.—*Moncreiff—Cuninghame.*

P. WARNER, and R. BEAUMONT, Chargers.—*Cranstoun—Greenshields.*

Feb. 26, 1823.

FIRST DIVISION. Bill-Chamber. Lord Succoth. S.

Society—Tack.—Cuninghame and Warner were joint partners in a mutual lease of the coal of their respective estates, for a long period of years, under which Beaumont was appointed manager. A dispute having arisen between the partners as to the right of the company to work coal in a part of Cuninghame's estate, (which was to be done by means of a pit on Warner's property), the Court, in a suspension, found, that they were entitled to do so; but, an appeal having been taken, they refused to allow the coal to be worked in the meanwhile. The manager then proposed to sink another pit, also on the lands of Warner, about 30 yards distant from the former one, in order to raise coal within his bounds, (which was company property), and Cuninghame was required to contribute his share of the expence. Against this, he presented a bill of suspension and interdict, on the ground, 1. That this was an attempt to evade the previous judgment of the Court, refusing to allow a pit to be sunk pending the appeal; and, 2. That it was an inexpedient act of management, which would not repay the expence, and was dangerous, from the nature of certain proposed operations. The Lord Ordinary ordered memorials; and the Court, on advising them, and the reports of two engineers, who agreed that it was an expedient measure for the company, refused the bill.

J. SMYTH, W. S.—T. MEGGET, W. S.—Agents.

Mrs. CAMERON, Pursuer.—*Cuninghame.*
J. SHAND, Defender.—*J. Tait.*

No. 223.

Feb. 26, 1823.

FIRST DIVISION.
Lord Alloway.
D.

Agent and Client.—The pursuer having employed Shand, an attorney in Jamaica, to recover funds to which she had succeeded, brought an action of accounting against him. He stated, in defence, that he had, by her orders, remitted the funds to a person in this country; and that, at all events, as he had informed her of the money having been so sent, she had lost all claim against him, by neglecting for a long period, to take steps to recover it. The Lord Ordinary, before answer, ordered him to give in a condescendence of certain alleged payments by that person to the pursuer; and the Court adhered.

J. MACDONNELL, W. S.—LAMONT & NEWTON, W. S.—Agents.

G. NIELSON, Pursuer.—*J. Tait.*
J. ERSKINE, Defender.—*Marshall.*

No. 224.

Feb. 26, 1823.

FIRST DIVISION.
Lords Gillies and
Meadowbank.
S.

Prescription—Positive—Vicennial—Negative.—The late John Nielson was three times married. The pursuer was the lineal heir of the *first* marriage; and the authors of the defender were the children of the *second.* To these children John Nielson bound himself, by an antenuptial contract, to secure all the heritable subjects he should acquire by conquest during the second marriage. While it was subsisting, he received a legacy which had been provided to him and his children of the *first* marriage, with which he purchased two acres of land, taking the disposition to himself, his heirs, and assignees, in fee, on which he

was infeft. By an antenuptial contract under his *third* marriage, he disponed all his property, including *one* of these acres, to himself and wife in liferent, and to the children of that marriage in fee; whom failing, to his own nearest and lawful heirs and assignees whatsoever. Of the *third* marriage there was no issue. John Nielson died in 1747, and was survived by his widow, who liferented the *one* acre till 1788. In 1757, his two children, Alexander and Elizabeth, of the *second* marriage, expede and retoured a special service as heirs of conquest and of provision under the antenuptial contract, and obtained a charter of confirmation of the disposition of the two acres, and a precept of clare constat, on which they were, in 1767, infeft. Alexander disponed his half, mortis causa, to Elizabeth, and died in 1773, when Elizabeth entered into possession, and continued it on apparency till 1792. She then conveyed the two acres to a third party, who made up regular titles, and from him the defender, Erskine, derived right, and enjoyed possession, on regular sasines. The pursuer, as representing the heir of the *first* marriage, raised, in 1817, an action of reduction of the defender's titles, of declarator of his own right to the two acres, and of maills and duties, on the ground that the two acres having been purchased by John Nielson by means of a legacy, and not by funds acquired onerously, were not conquest, and, therefore, belonged to the pursuer, as heir of line. Against this action Erskine pleaded,—1. The positive prescription, in support of which he produced the retour and precept of clare constat, and relative sasine in 1767, and sasines for more than forty years; 2. That the reduction of the retour was barred by the vicen-

nial prescription; and, 3. That the right of challenge was cut off by the negative prescription. To this it was answered, inter alia, 1. That as no charter was produced, it was necessary to shew a possession on a connected series of sasines; but that the possession of Elizabeth, from the death of Alexander, in 1773, till 1792, had been on apparency only; 2. That the retour was, ex facie, null; and, 3. That with regard to the *one* acre liferented by the widow of the third marriage, the pursuer was non valens agere cum effectu. The Lord Ordinary assoilzied the defender, and the Court adhered.

It was observed, that as there was possession on sasines, both prior and posterior to that on apparency, it was thus rendered connected; and that as to the *one* acre, the possession of the liferentrix was that of the fiars, who were the authors of the defender, and not of the pursuer.

Pursuer's Authorities.—(1.)—2. St. 12, 15; 3. Erak. (Pr.) 7, 2; 3. Erak. 5, 7; Caitcheon, Jan. 22, 1791, (10810).—(3.)—3. Erak. 7, 8; 2. St. 12, 11; Younger, June 30, 1665, (10924); 3. Erak. 7, 37; 2. St. 12-27; Brown, Feb. 5, 1680, (11209).

Defender's Authorities.—(1.)—1. Younger, June 30, 1665, (10924); Scott, Feb. 20, 1787, (8625); 2. Erak. 6, 18.—(2.)—Langton, Feb. 4, 1612, (6847); 1617, c. 12.

TAIT, YOUNG, & LAWRIE, W. S.—TOD & ROMANES, W. S.—Agents.

J. M'KINLAY, Suspender.—*Christison.*
ISABEL NELSON, Charger.—*Napier.*

No. 225.

Feb. 27, 1823.

FIRST DIVISION.
Lord Meadowbank.

Jurisdiction—Justice of the Peace.—The charger raised an action before the Justices of the Peace against the suspender, alleging that she had born a natural child to his son,—that she had obtained

H.

decree against him for aliment,—and that, having learned that he was about to flee the country, she had procured a meditatio fugæ warrant against him; but that, in consequence of a promise by the suspender to pay the aliment, the warrant was not executed, and the son had fled. She, therefore, concluded that the suspender ought to be found liable for the aliment. After some proceedings, he objected, that the action being founded on an alleged cautionary obligation, the Justices had no jurisdiction. They decerned against him; but, in a suspension, the Lord Ordinary and the Court found that they had no jurisdiction, repelled a plea of prorogation, and suspended the letters.

Suspender's Authorities.—Talt, 136, 1. Hutch. 120–125; Lawrie, Jan. 31, 1812, (F. C.); Barclay, Feb. 13, 1769, (1. Hutch. 124.)
Charger's Authority.—Boyd, Jan. 24, 1769, (7617).

T. Darling,—W. Todd, W. S.—Agents.

No. 226. Right Hon. H. Elliot, Pursuer.—*Moncreiff—H. J. Robertson.*
Lord Stair's Trustees, Defenders.—*Gordon—Murray.*

Feb. 27, 1823.
First Division.
Lord Meadowbank.
D.

Presumed Intention—Legacy.—In 1815, the late Lord Stair executed a trust-deed conveying his whole property, both in England and Scotland, (excepting his entailed estate), to the defenders, inter alia, to pay certain legacies, and 'all other legacies, annuities, 'or donations which I may think proper to grant by 'any writing under my hand,' reserving power to revoke the trust-deed, but declaring 'that in so far 'as not altered by me, the same shall be a valid

'evident.' By a codicil in 1817, he appointed his trustees to pay to Mr. Elliot £3,000, without any qualification whatever; and, in 1819, he made a testament, by which he bequeathed to him 'the 'sum of £3,000 lawful money of Great Britain, to 'be paid within six months after my death, free of 'the legacy-tax, and of all other deductions.' By this testament, he conveyed to one of his trustees as executor, all his English personal estate, (out of which he was to pay the legacy-tax), and after converting it into money, and vesting it in Government stock, directed him to transfer it to the trustees, to be applied in the manner pointed out by his trust-deed, which was specially mentioned.

Soon after executing the trust-deed, he had, by a codicil, bequeathed to two of his friends certain legacies, and, by a codicil to his testament, he augmented them, stating, that the one was 'in lieu,' and the other 'in addition' to the previous legacies. On the death of Lord Stair, Mr. Elliot raised action for payment both of the legacy in the trust-deed and that in the testament, on the ground, 1. That it was the intention of Lord Stair that both should be paid, as was indicated by his being fully in the recollection of the first legacy, —by his knowledge at the date of the testament that Mr. Elliot was about to lose the Governorship of Madras,—and by the terms in which the legacies to his other two friends were expressed; and, 2. That being left by separate deeds, differing in date, nature, and effect, and that, although the sums were the same, yet, as they were not left under the same qualities, nor payable at the same time, both were in law due. The trustees maintained, in defence, that both sums being the same, the presumption of law

was, that only one legacy was intended. The Lord Ordinary being of opinion that there were no means of ascertaining the precise intentions of Lord Stair, and holding that the general principle was in favour of Mr. Elliot, decerned in his favour. The Court at first, by a majority, altered, but thereafter unanimously adhered to his Lordship's interlocutor.

Pursuer's Authorities.—Dig. 22, 3, 12; 1. Voet. 775, § 9; 2. Voet, 340, § 34; Cujac. Ob. lib. 14, c. 19; 1. Gomezius, 12–38; 3. Swinburne, 1028; 1. Roper, 491, 492–499; Toller, 334; Brown's Cases in Ch. 388; Stirling, June 20, 1704, (11442); Macintyre, Mar. 1, 1821, (Not yet rep.)

Defenders Authorities.—St. 714; 4. Bankt. 45, 56; 1. Bankt. 11, 61; 3. Ersk. 9, 14; 30. Dig. 1, 34, § 2 and 3; 33. Dig 4, 1, § 14; 6. Cod. 37, 1; 1. Roper, 491, 499; Wallace, Nov. 13, 1624, (6345); Traquair, Mar. 8, 1626, (3591); Burnet, Feb. 24, 1709, (11467); Belches, Dec. 22, 1752, (11361); Gallie, Dec. 18, 1782, (11374); Cases in Mor. p. 11475–6, 7–9, 11338, 11348, 2309; 2. Dict. 180, 163; 4. Dict. 190.

MACKENZIE & INNES, W. S.—J. & A. SMITH, W. S.—Agents.

No. 227. A. SPIERS, Advocator.—*Clerk—Cuninghame—Spiers.* ARDROSSAN CANAL COMPANY, Respondents.—*Jardine.*

Feb. 27, 1823.

SECOND DIVISION.

F.

Declinature.—In an advocation at the instance of Spiers against the Ardrossan Canal Company, the Lord Justice-Clerk declined judging, on the ground, that a near relative was proprietor of shares in the Ardrossan Canal Company. A note was given in for the company, submitting, that the principle of the act of sederunt 1st February 1820, declaring, that a Judge, 'holding shares of any chartered bank,' should not form a ground of disqualification in any question where the bank had an interest, applied to this case, as the Ardrossan Canal Company was a chartered company, the partners of which were only liable to

the extent of their shares. The Court, after consulting with the other Judges, repelled the declinature.

JOHN KERR, W. S.—W. PATRICK, W. S.—Agents.

G. LOGAN and Others, Pursuers.—*Moncreiff—Bruce.*
R. LOGAN and Others, Defenders.—*Cranstoun—Ro. Bell.*

No. 228.

Feb. 27, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Probative Writ—Depositation—Delivery of Deeds.—After the death of the late Mr. Logan of Edrom, Mr. Turnbull, his man of business, produced two deeds of entail and settlement in favour of George Logan, his eldest son, and of certain trustees, which had been committed to his custody; and also, a packet sealed with the private seal of the deceased, having written on it the following doquet holograph of Mr. Turnbull, and signed by the deceased.—'Mr. Logan 'of Edrom's settlements.—*Edrom, 5th May* 1818.—'Deposited with David Turnbull, writer to the signet, 'to be by him destroyed, unopened, in case of my de-'cease before the 28th day of May current.' Mr. Logan died on the 24th of May, and Mr. Turnbull refusing to give up the packet, Mr. Logan's eldest son, and the trustees, raised action against him, concluding, that he should be ordained to produce the packet in Court, that it might be destroyed unopened, in terms of the doquet. On the other hand, Mr. Logan's younger children raised action against him, concluding, that the packet should be opened, and the deeds contained in it put on record; and Mr. Turnbull raised a multiplepoinding, calling all the family of the deceased, that he might dispose of the

packet as the Court should direct, and be exonered of all further responsibility. The Lord Ordinary conjoined and reported these actions, and the Court, after a hearing in presence, sustained the title of the younger children, to 'appear for their interest in this 'discussion;' and Mr. Turnbull having lodged the packet, they exonered and discharged him as depositary, and ordained the packet to be opened by the clerk. It was found to contain deeds of settlement and of entail, as to the disposal of which, memorials were ordered. The eldest son, and the trustees, contended,—1. That the doquet must be held as having intercepted delivery of the deeds; and, 2. That there was a proper depositation of the packet in Mr. Turnbull's hands, and that it was, therefore, competent to prove, by the doquet and his oath, the terms of that depositation, which must be complied with. It was maintained by the younger children,—1. That, as the deeds dispensed with delivery, the doquet could only be considered as a revocation, and that, not being probative, in terms of the act 1681, no effect could be given to it; and, 2. That the custody of Mr. Turnbull being equivalent to that of Mr. Logan, there was not a proper depositation. The Court ordained the deeds to be placed on record.

Pursuers Authorities.—(1.)—3. Ersk. 2, 43–4; Kilk. v. Writ. p. 605, 609.—(2.)—1. St. 13, 4; 1. Bankt. 15, 11; 3. Ersk. 2, 43; Garden, Jan. 29, 1724, (3519); Norvel, June 22, 1763, (12290).

Defenders Authorities.—(1.)—1579, c. 80; 1681, c. 5; 3. Ersk. 2, 22–3; Crichton, Jan. 12, 1802, (15952); Dundas, May 13, 1817, (F. C.); Dundas, Feb. 25, 1783, (15585); Henderson, Jan. 31, 1797, (15444); M'Farlane, May 22, 1790, (8459); 3. Ersk. 2, 43; 1. Stair, 13, 4; 1. Bank. 375.

TAIT & BRUCE, W. S.—TOD & ROMANES, W. S.—Agents.

Mrs. E. CAMPBELL and J. PEDIE, Pursuers.—*More.* No. 229.
W. RAE, Defender.—*Fergusson.*

Expences.—This was a question of expences, in which no point occurred. Feb. 27, 1823.

SECOND DIVISION.
Lord Cringletie.
F.

ALEX. NAIRNE,—JAS. GEMMELL,—Agents.

W. BAIRD, Advocator.—*Blackwell.* No. 230.
J. RAE, Respondent.—*Shaw.*

Expences.—In an advocation at Baird's instance, of interlocutors of the Magistrates of Glasgow, the Lord Ordinary remitted the case to the Magistrates, with instructions, and found Rae liable in the expences incurred in this Court. Rae having petitioned against the award of expences, the Court, of consent, remitted to the Magistrates to determine as to the expences on both sides. Feb. 28, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

THOS. DARLING,—A. P. HENDERDSON,—Agents.

M. CLARK, Suspender.—*Moncreiff—Ivory.* No. 231.
J. SHEPPERD, Charger.—*Gordon.*

Bill of Exchange—Society.—The bill of suspension noticed ante, Vol. I, No. 214, (which see), having been passed, the Lord Ordinary found the letters orderly proceeded, 'in respect that it is proved by the 'charger's oath, that he is an onerous indorsee to the 'bill charged on; as also, that it is drawn by Allan 'on and accepted by Mathew Clark and Company; 'and there is not only no evidence of the charger's Feb. 28, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

'knowledge, that, in drawing such a bill, Allan was 'guilty of any impropriety of conduct; but, from said 'oath, it appears that the charger might, bona fide, 'believe that Allan was a creditor of the company, 'and had right to draw the bill;' and the Court adhered.

Suspender's Authorities.—1. Bell, 312–4, & 2. 616–8; Kennedy, Dec. 22, 1814, (F. C.); Miller, 22d Jan. 1811, (F. C.); Ridley, 13. East. 175; Johnstone, Sharp, and Company, *v.* Phillips, in House of Lords, 24th July 1822.

M'Millan & Grant, W. S.—Ro. Burn, W. S.—Agents.

No. 232.

L. Mackersy, Petitioner.—*Bell—Hunter.*
J. Mackenzie and J. Robertson, Respondents.—*Forsyth—P. Robertson.*

March. 1, 1823.

First Division.
H.

Bankrupt-Statute—Law-Agent.—Mackersy, trustee on the sequestrated estates of Borthwick and Goudie, merchants in Dunbar, applied for a warrant under § 32 of the bankrupt act, to examine Mackenzie, the law-agent of the bankrupts, and Robertson, his clerk, as to their knowledge of their affairs. This was resisted, on the ground, that a law-agent was not bound to disclose confidential communications; and that, as all the information possessed by Mackenzie and his clerk related to depending actions, they could not be examined on these matters. The Court at first (by a majority), granted the warrant, holding, that a law-agent generally was subject to examination under the bankrupt act; but, on a reclaiming petition and answers, their Lordships unanimously adhered, in respect of the special circumstances which were now stated by the trustee.

On the general point, their Lordships were much divided in opinion. The majority held, that the rule of the common law was superseded by the bankrupt statute, which was of a scrutinising nature, as was exemplified by the wife being ordered to be examined; and that the law-agent, having an opportunity of being acquainted with the affairs of the bankrupts, could no more plead an exemption under the common law than she could. The minority held, that unless special cause were shewn, it was incompetent to subject a party to examination simply as law-agent.

Petitioner's Authorities.—13. Eliz. c. 7, § 5 and 6; 1. Jac. 1, c. 15, § 10; 21. Jac. 1, c. 19, § 6 and 9; 5. Geo. II, c. 30, § 16; 2. Bell, 423, 408, 410.

Respondents Authorities.—St. p. 718; M'Leod, Dec. 21, 1744, (16754); 2. Bell, 423; M'Lea, Dec. 4, 1792, (7580).

GIBSON & OLIPHANT, W. S.—J. MACKENZIE,—Agents.

C. RUSSELL.—*Henderson.*
A. GOLDIE, Common Agent in Ranking of Parton.—*Whigham.*
Competing.

No. 233.

March 1, 1823.

FIRST DIVISION.
Lord Alloway.
S.

Competition—Ranking and Sale.—The late Mr. Glendonwyn sold the estate of Parton, under burden of the price, to Scott, who was infeft. Scott's affairs becoming embarrassed, he disponed Parton in trust to Russell, with power to sell, and, 'after deduction 'of the public burdens affecting the said estate, and 'of all necessary charges and expences to be disburs-'ed by him or his factor in relation to this trust-'right,' to pay the balance in extinction of his debts. A relative deed of accession was executed by many of the creditors after public advertisements, circular

letters, and various meetings; but the deed was not signed by those who were in right of the reserved heritable burden. Russell was infeft in 1814, entered into possession, disbursed considerable sums, and continued to act till 1818, when a ranking and sale was brought by one of the heritable creditors, and the estate was sequestrated and placed under the management of a judicial factor. In the ranking, Russell claimed to be preferred for the sums advanced by and due to him under the trust, on the ground, 1. That they had been beneficially expended on the estate; and, 2. That the trust had been acceded to by all the creditors either directly or rebus et factis. The common agent maintained, that Russell's right being posterior to that of the heritable creditors, could not affect them, and that he had no preferable claim over the personal creditors, as there was no general accession. The Lord Ordinary sustained 'the objection stated by the common agent against 'Mr. Russell's claim to be ranked as a preferable 'creditor on the estate; reserving to him his claim 'of relief against the creditors by whom he was 'employed, and under whose authority he acted.' But the Court 'recalled the interlocutor of the 'Lord Ordinary reclaimed against, and find the pe-'titioner, Claud Russell, entitled to charge against 'the estate of Parton all the just and necessary ex-'pences incurred by him in the character of herit-'able trustee under Mr. Scott's trust-deed;' and appointed the common agent to lodge a condescendence of the articles to which he objects under the above general finding.

The majority of their Lordships were of opinion, that as Russell had been allowed to remain in undisturbed

possession for four years on a legal title, and had, bona fide, and beneficially for the estate, expended money, he was entitled to be reimbursed out of it; and that, in the circumstances, the heritable creditors were barred from resisting the claim.

Russell's Authorities.—Jacques and Co., Feb. 12, 1817, (F. C.); 2. Bell, 592, and Cases there; Goodwin, Feb. 1, 1815, (F. C.)
Common Agent's Authorities.—2. Bell, 594, 592.

GIBSON & OLIPHANT, W. S.—A. GOLDIE, W. S.—Agents.

J. and J. NEILSON, Suspenders.—*P. Robertson.* No. 234.
Mrs. M. WATERSTONE and Others, Chargers.—*More.*

March 1, 1823.

SECOND DIVISION. Bill-Chamber. Lord Mackenzie. M'K.

Process.—Neilsons, possessors of a flat of a house in Paisley, presented a bill of suspension and interdict against the proprietor and tenants of the flat immediately above them, to prevent them from occupying it as a tailor's workshop, which they alleged was a nuisance. The Lord Ordinary passed the bill, refusing the interdict. Waterstone, &c. reclaimed, and contended, that a matter of such a trifling nature ought to have been brought before the judge-ordinary of the bounds, and not made the subject of an expensive litigation in the Supreme Court. The Court altered the interlocutor, refused the bill, (reserving to the suspenders to apply to the judge-ordinary), and found them liable in expences.

A. NAIRNE—JAS. STEWART,—Agents.

No. 235. G. WEBSTER, Pursuer.—*Cranstoun—Neaves.*
Mrs. E. LANGLANDS and Others, Defenders.—*Gillies.*

March 1, 1823.
SECOND DIVISION.
Lord Pitmilly.
F.

Process—Amendment of Libel.—Webster raised a summons of reduction of a disposition and settlement, on the allegation that the granter had no just right to the subjects contained in them. After the cause had come into the Inner-House, he offered an amendment of his libel, by introducing a conclusion of declarator of trust. The Court found the amendment incompetent.

Defenders Authorities.—A. S. Jan. 1, 1726; Feb. 7, 1810.

THOS. DEUCHAR—JOHN RAMSAY,—Agents.

No. 236. T. AITKEN and Others, Suspenders and Pursuers.—*Jeffrey—J. Henderson, jun.*
R. WALKER and Others, Representatives of HENRY WALKER, Defenders.—*More.*

March 1, 1823.
SECOND DIVISION.
Lord Cringletie.
M'K.

Usury.—The late Henry Walker having charged Fergusson, and Aitken and others, his cautioners, as co-obligants in a promissory-note granted by them to him, Aitken, &c. suspended, and afterwards raised action of reduction of the bill, as usurious. They alleged, that the bill had been granted to Walker, in consideration of a loan made by him to Fergusson, but advanced principally in the shape of webs, which had been estimated at a price far beyond their real value, and, on the falsely estimated value of which, interest had been stipulated and received at five per cent. These statements were denied by the defenders, who alleged that the transaction was a proper

sale. The Lord Ordinary assoilzied them; and the Court, after allowing the pursuers to give in a specific condescendence, adhered.

THOMAS WALKER—WILLIAM WALKER, W. S.—Agents.

W. BERRY, &c. Petitioners.—*Sandford.* No. 237.
J. and A. ANDERSON, Respondents.—*Greenshields.*

Process—Interim Execution.—The application of Berry, &c. to have the lands of Pitcalzean sequestrated, and a judicial factor appointed, having been refused, (See ante, Vol. II, No. 93), they now applied for interim execution, pending appeal, praying to be put in possession of the lands. A petition for interim execution, as to the expences, had been formerly presented and granted; and the Court, both on the ground of the incompetency of a second petition for interim execution, and on the merits, refused this application.

March 1, 1823.
SECOND DIVISION.
F.

G. HEGGIE, W. S.—GEO. DUNLOP, W. S.—Agents.

T. MEGGET, W. S. Complainer.—*Skene—Brownlee.* No. 238.
J. FAIRLEY, Respondent.—*T. H. Miller.*

Process—Sequestration—Trustee.—Megget, a creditor under a sequestrated estate, presented a petition praying the Court to remove the trustee from his office, for having disregarded the directions of a meeting of creditors. It was objected to the competency, that Megget was not a creditor to the amount of one-fourth of the debts ranked, as required by § 71 of the bankrupt-act, to warrant such an applica-

March 1, 1823.
SECOND DIVISION.
F.

tion. The Court dismissed the complaint as incompetent. In a reclaiming petition, Megget contended, that under § 45 and § 46, it was competent for any one creditor to apply for the removal of the trustee, on the grounds on which he founded his complaint. But the Court, in respect of his not having founded on these sections of the act in his original application, refused the petition, reserving to him to present a new complaint.

THOS. MEGGET, W. S.—BURD, M'MILLAN, & MILLER, W. S.—Agents.

No. 239. THOMSON'S TRUSTEES, Petitioners.—*Ivory.*
Misses CLARK, Respondents.—*G. Graham Bell.*

March 4, 1823.

FIRST DIVISION. H.

Proof—Confidential Writ.—In the course of the execution of a diligence for recovery of writings in an action at the instance of Misses Clarks against Thomson's trustees, the latter demanded production of a memorial laid before counsel, and his opinion, on the ground, 1. That they had been communicated to them prior to the institution of the action; and, 2. That they had been founded on in the pleadings by the Misses Clarks. To this it was objected, that they were confidential,—that they had been shewn with the view to a compromise,—and that the trustees having alleged, in a condescendence, that the memorial contained a gross mis-statement of the facts, it had been merely averred in the answers, that the statement of facts there made was correct. The trustees prayed the Court to ordain them to be produced; but their Lordships refused to do so.

W. DALLAS, W. S.—GIBSON & OLIPHANT, W. S.—Agents.

W. MATHER, Pursuer.—*Moncreiff—More.* No. 240.
D. MATHIE, Defender.—*Jeffrey—Blackwell.*

March 4, 1823.

FIRST DIVISION.

Lord Meadowbank.

H.

Cautioner—Implied Obligation.—Robert Mathie applied to Mather to sell goods to him, and offered, in security of the price, the guarantee of his mother, a married woman, in possession of an heritable estate. Being unable to inform him of the precise nature of her right, he, at the request of Mather, went to the defender, his brother, a writer, and heir of his mother, for information, who wrote to Mather,—'In 'answer to the question you put yesterday to my 'brother, let me state, that my mother is unlimited 'proprietor, in her own right, of the lands he refer- 'red to, and that in my apprehension, you could not, 'in any event, be put to any trouble in the transac- 'tion.' A letter of guarantee by his mother was, with consent of her husband, executed and delivered, on the faith of which the goods were sold to Robert Mathie. He having failed, and the Court having found that the letter of guarantee was not binding, Mather raised this action on the above letter, concluding that the defender was liable for the debt, as he had warranted the validity of the guarantee, (which was written by himself), and that he had come forward ultroneously. In defence it was stated, that the letter was sent in answer to a question by Mather, and merely contained a statement of the fact, that the defender's mother was unlimited proprietrix, —that he was not employed professionally to procure a valid security,—and that this was an attempt to make him responsible for an opinion in law. The Lord Ordinary and the Court sustained the defences.

Pursuer's Authorities.—Crichton and Co., June 30, 1797, (8229); Rankine, May 15, 1812, (F. C.)

J. Hill, W. S.—G. Napier,—Agents.

No. 241. Sir Hew D. Hamilton, Petitioner.—*Thomson—Jeffrey—Moncreiff—Jameson.*
Mrs. Hamilton Fullerton, Respondent.—*Forsyth—Tawse—P. Robertson.*

March 4, 1823.

Second Division. M'K.

Inhibition.—Mrs. Fullerton, in 1814, raised an action of reduction of Sir H. D. Hamilton's titles to the entailed estate of Bargany, and of declarator of her right, as heir of entail. While this process was depending in this Court, under a remit from the House of Lords, she instituted a supplementary action, concluding for payment of £200,000, as the amount of bygone rents, on which she raised and executed letters of inhibition against Sir Hew, who, besides Bargany, was possessed of the entailed estate of North Berwick. Sir Hew applied to the Court to recal the inhibitions as inimious and oppressive, seeing he was effectually fettered by the entails. The Court recalled them simpliciter.

Russell, Anderson, & Tod, W. S.—H. Cannan, W. S.—Agents.

No. 242. Sir H. D. Hamilton,—*Thomson—Jeffrey—Moncreiff—Jameson.*
Mrs. Hamilton Fullerton.—*Forsyth—Tawse—P. Robertson.*

March 4, 1823.

Second Division. Bill-Chamber. Lord Mackenzie. M'K.

Arrestment, Loosing of.—Mrs. Fullerton having executed arrestments against Sir Hew Hamilton, on

the action mentioned in the preceding case, he presented a bill, to have them loosed, without caution, which the Lord Ordinary reported. The Court being equally divided, his Lordship was called in, when this interlocutor was pronounced.—'The Lord Ordinary having advised with the Lords of the Second Division of the Court, is of opinion, that the arrestments complained of ought to be loosed, without caution, unless the respondent shall find caution on her part to answer for the damage resulting from keeping up the said arrestments; and, therefore, supersedes further advising for fourteen days, in order to give time to find the said caution, with certification.' Mrs. Fullerton reclaimed, but the Court adhered.

Two of the Judges held, that the claim for the rents being merely contingent and hypothetical, the arrestments ought to be loosed, without caution; but that, at all events, Mrs. Fullerton ought to find caution for damages. The other two Judges were of opinion, that this being an arrestment in security on a depending action, was a legal diligence, and could only be loosed on caution; and that Mrs. Fullerton was not bound to find caution.

RUSSELL, ANDERSON, & TOD, W. S.—H. CANNAN, W. S.—Agents.

J. A. URE, Pursuer.—*J. Miller, Junior.*
E. GILCHRIST and Others, Defenders.—*R. Bell.*

No. 243.

March 4, 1823.

SECOND DIVISION.

F.

The Court, of consent, decerned in the cessio which they had formerly refused, (see ante, Vol. I, No. 428).

D. GREIG, W. S.—HUNTER, CAMPBELL, & CATHCART, W. S.—Agents.

No. 244. Mrs. B. GUTHRIE, Pursuer.—*Rutherfurd.*
B. MOODIE, Defender.—*Skene.*

March 4, 1823.

SECOND DIVISION. Lord Pitmilly. F.

Implied Obligation.—Mr. Moodie having been commissioned by his aunt, Mrs. Guthrie, to procure lodgings for her in London, he took apartments for her from one Mitchell, 'for a fortnight certain, and to 'quit at a week's notice.' Having come to London, and taken possession of the lodgings, she invited two nieces, sisters of Mr. Moodie, to live with her during her stay. At the end of the first week, she gave notice, that she was to quit at the end of the fortnight; and she left London before the expiry of the second week. The young ladies, however, remained in the lodgings for two days of a third week, and, on this account, Mitchell demanded from Mrs. Guthrie another week's rent. Without intimating this demand to Mr. Moodie, (who had, by this time, gone to Scotland), or asking him to discharge it, she entered into a lawsuit with Mitchell, in which she cited Mr. Moodie as one of her witnesses, and had a verdict given against her. She afterwards raised this action against him, for payment of the rent of the additional week, and of the expences she had incurred in the lawsuit, alleging, that she had always looked on him as responsible, and had carried it on for his behoof. This he resisted, on the ground, that, although he might have been willing to have paid the additional week's rent occasioned by his sisters' residence in the lodgings, yet he was not bound to do so; and, at all events, never would have advised the lawsuit, which was undertaken without his know-

ledge. The Lord Ordinary decerned against him, but the Court altered, and assoilzied him.

JAS. PATTISON, W. S.—GEO. VEITCH, W. S.—Agents.

A. CAMPBELL and Others, Suspenders and Pursuers. —*Greenshields.*
J. MACKIE and Others, Chargers and Defenders.—*Henderson.*

No. 245.

March 4, 1823.

SECOND DIVISION. Lord Pitmilly. F.

Jurisdiction——Expences.——Campbell and others having shipped grain on board a vessel belonging to Mackie and others, which was destroyed by salt-water, raised action for the value before the Sheriff of Wigton. The Sheriff, in respect of an alleged compromise by the agent of Campbell, &c. assoilzied Mackie, &c. and gave them decree for expences. Of this decree, Campbell, &c. brought a suspension, and an action of reduction of the absolvitor, on the ground that the Sheriff had no jurisdiction, and that their agent had no authority to compromise the debt, and concluding also for payment of the value of the grain. The Lord Ordinary being satisfied that the agent of Campbell, &c. had not been authorized to compromise the dispute, and in reference to the pleas of the parties, pronounced this interlocutor.—'In 'respect the decree of absolvitor and for expences 'was unwarranted on the merits, and was also pro- 'nounced by a court which had not jurisdiction in 'the cause, decerns in terms of the reductive con- 'clusions; but, in respect the Court of Admiralty 'was the only competent Court for trying the ques- 'tion, in the first instance, between the parties, sus- 'tains the defences against the petitory conclusions,

'and dismisses the libel as incompetent; and, further, in respect the pursuers insisted in an incompetent action, and the defenders made no objection to the competency in the inferior court, and now, while they plead the incompetency, still maintain that the decreet of absolvitor shall have effect, finds neither party entitled to any expences heretofore incurred, and decerns.' The Court adhered.

JAS. WEMYSS, W. S.—WELSH & EWART, W. S.—Agents.

No. 246.

R. STEVEN, Pursuer.—*Maidment.*
W. LEVY and Others, Defenders.—*Ivory.*

March 6, 1823.

FIRST DIVISION. H.

Cessio.—Decree of cessio was here opposed, chiefly on the ground, that the pursuer had lately conveyed a vessel to his sisters, in payment of a prior debt, and that this being a transaction inter conjunctos, was a fraud against the other creditors. The Court decerned in the cessio.

Their Lordships were of opinion, that this was not such a fraud as to deprive a party of the benefit of the cessio; and that, at all events, the sale might be reduced under the act 1621.

W. JAMIESON, W. S.—J. GORDON, W. S.—Agents.

No. 247.

W. S. GLASS, Petitioner.—*Cockburn—Alison.*
G. PENTLAND, Respondent.—*Fullerton—Moncreiff.*

March 6, 1823.

FIRST DIVISION. D.

Interim Execution—Appeal—Cessio.—Pentland having appealed against the judgment of the Court finding Glass entitled to the benefit of the cessio,

(see ante, Vol. II, No. 124), the latter applied for interim-execution. The Court granted warrant for liberation in the meanwhile, on finding security for £1,000.

J. CAMPBELL, Junior, W. S.—W. DOUGLAS, W. S.—Agents.

D. SPOTTISWOODE and Others, Petitioners.—*Forsyth.* No. 248.
EAST LOTHIAN BANKING COMPANY, Respondents.—*Bell—Hunter.*

Sequestration—Bankrupt.—Sequestration under the bankrupt-act having been awarded, of the estates of William Borthwick, Bruce Borthwick, and George Goudie, as copartners, trading under the firms of William Borthwick, Borthwick and Goudie, George Goudie and Company, Borthwicks and Company, and Bruce Borthwick and Company, a petition for recal was presented by Spottiswoode and Others, creditors, and also by the partners, on the ground, 1. That the companies were perfectly distinct; and, 2. That no evidence of insolvency had been produced. The case resolved into a question of fact; and the Court being satisfied that sequestration had been legally awarded, refused the petition.

March 6, 1823.
FIRST DIVISION.
H.

J. MACKENZIE, W. S.—GIBSON & OLIPHANT, W. S.—Agents.

J. M'PHERSON, Advocator.—*Cuninghame.* No. 249.
Mrs. C. CAMERON and Others, (Colonel M'Pherson's Trustees), Respondents.—*P. Robertson—M'Neill.*

March 6, 1823.
SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
F.

Expences.—M'Pherson, a tenant on the estate of the late Colonel M'Pherson, was prosecuted before

the Sheriff by the Colonel's trustees, under the act 1698, c. 16, for cutting growing timber. The Sheriff, after repelling several preliminary objections on the part of M'Pherson, allowed a proof, and thereafter assoilzied him, but found no expences due. MacPherson presented a bill of advocation, with the view of having expences allowed him, which the Lord Ordinary refused; but the Court altered, and remitted to the Sheriff, with instructions to decern in M'Pherson's favour for expences, so far as successful.

JAS. MACDONNELL, W. S.—D. CAMERON, W. S.—Agents.

No. 250. MRS. A. NIVEN and Husband, Suspenders.—*Cranstoun—Marshall.*

J. PITCAIRN and Others, (Trustees of A. Pitcairn, deceased), Chargers.—*Forsyth—L'Amy.*

March 6, 1823.

SECOND DIVISION. Lord Pitmilly. M'K.

Heritable and Moveable.—The late A. Pitcairn having borrowed a sum of money from Mrs. Niven, granted to her a disposition in security of 'all and 'whole that piece of ground called the Lamberlaws, '&c. with the said Gallow-house itself, and Gallow-'hill, and whole erections on said grounds;' and she was infeft 'in all and whole the pieces of ground, 'with the houses and pertinents lying and bounded 'as before described.' The subjects consisted of about nine acres of land, on which there were several houses, and, particularly, an extensive building for the manufacture of oil of vitriol. In the interior of this building, and for the purposes of the manufactory, there were a large number of vessels called chambers, tuns, and sockers. The *chambers* were large leaden vessels, supported by wooden frames,

and were ranged on a platform of stone and lime, (which was built into and raised above the ground); and, although they were capable of being moved by the aid of machinery within the building, yet they could not be conveyed out of it, without being taken to pieces. The *tuns* were much of the same nature, and were kept in their proper position by posts fixed in the ground. The *sockers* were also made of lead, and formed the lining of stone recesses. Pitcairn having died insolvent, leaving a trust-deed in favour of the defenders, a competition arose between them and Mrs. Niven, as to the right to the above vessels. She maintained, that they were embraced in her heritable security; and presented a bill of suspension and interdict against the trustees, who insisted that they were moveable, and, as such, belonged to them. The bill having been passed, the Lord Ordinary, in respect of the case of Billenge against Arkwright, suspended the letters, and granted interdict, simpliciter. On a reclaiming petition, the Court, before answer, ordered the trustees to give in a minute, 'containing 'a precise and articulate statement of what they al- 'lege, with regard to the nature of the vessels de- 'scribed by the several names of chambers, tuns, and 'sockers, and how far, after being separated from 'the building, they were of any, and of what value, 'except as materials; and in what manner they were 'actually disposed of;'* and their Lordships being satisfied, that, in removing them from the premises, it was necessary to take them asunder, and that they had been actually cut down and sold as old lead, held them to be heritable; and, therefore, adhered.

* The vessels had been, in the meanwhile, of consent, sold.

In adhering to the interlocutor of the Lord Ordinary, the Court did not rest, as his Lordship had done, on the case of Billenge against Arkwright, with regard to which the Judges were agreed, that the Court did not proceed on the ground that the machinery, which formed the subject of competition, was heritable, and that they had actually recalled the interlocutor of the Lord Ordinary finding it to be so; but, holding it to be moveable, they preferred Arkwright, in respect that the terms of the disposition, together with possession, had vested him in the real right.

Suspender's Authorities.—2. St. i, 2–15 and ii; 2. Bell, i, 649 and ii, 2; 1. Ersk. 2, 4; 2. Craig, 8, 24; Dirl. 53; Dig. 19, t. 1, l. 11, 17; Nisbet, Feb. 7, 1624, (9628); Billenge *v.* Arkwright, Dec. 3, 1819, (F. C.); Lawton *v.* Salmon, 1. H. Black. 259; Elwes *v.* Man, East. 38.
Charger's Authorities.—1. Bankt. 3, 17; 2. Ersk. 2, 2; Hyslop, Jan. 16, 1811; Pothier, 464–515.

GEO. VEITCH, W. S.—LINNING & NIVEN, W. S.—Agents.

No. 251. W. THOMSON, Complainer.—*Clerk—Murray—Ivory—J. Wilson, Junior.*
MAGISTRATES of DUNFERMLINE, Respondents.—*Solicitor-General Hope—Cranstoun—L'Amy.*

March 6, 1823.
SECOND DIVISION.
M'K.

Burgh Royal—Sett.—By the sett of the burgh of Dunfermline, it is declared, that the extraordinary council for the annual election of Magistrates, shall always be complete, consisting in all of twenty-six persons; and 'That if at any of the diets at the next, 'and all succeeding annual elections, any member of 'the ordinary or extraordinary council shall happen 'to be absent, the present and succeeding councils 'shall supply such absents, by choosing merchants 'as proxies, for such absent merchants; or crafts-'men as proxies, for such absent craftsmen; or where

' a vacancy shall happen by death or otherwise, the ' present and succeeding councils shall supply the ' same, by electing a merchant in place of a mer- ' chant, and a craftsman in place of a craftsman.' And by an explanation of the sett, given by the royal convention of burghs in 1724, it was directed, that, in the event of the death of a provost between the annual elections, if it was wished to supply his place, before the next general election, he was to be chosen by the extraordinary council of twenty-six, consisting of the usual members, and of ' a proxy for ' the provost deceased.'

In 1822, the then provost having died, the council, at the next annual election, before choosing the magistrates, filled up the council, by appointing ' James ' Kerr, proxy for the said Major David Wilson, pro- ' vost, (now deceased);' and the council, so completed, elected the Magistrates and council for the ensuing year. Thomson complained to the Court against this election, on the ground,—1. That the extraordinary council was not properly filled up, because, instead of electing a ' proxy' for the deceased provost, the council ought to have elected an actual provost, without which, he maintained, the extraordinary council was not complete in terms of the sett. 2. That Mr. Lawrence Wilson, who, it was alleged, had been two years treasurer, and one year old treasurer, had been elected an old bailie, without going out of the council for one year, as required by the sett; and, 3. That although the sett required four persons to be removed annually from the council, yet three persons only were removed, the vacancy by the death of the late provost having been held as making the fourth. The Court found,—1. That the sett did not require the

actual election of a provost, but merely of a proxy, in the event of a vacancy by death, in order to complete the extraordinary council. 2. That Lawrence Wilson had not been two years treasurer; and, 3. That if four persons were in fact removed, (although, by the death of one of them,) the terms of the sett were complied with; and, therefore, dismissed the complaint.

D. Wilson, W. S.—P. Pearson, W. S.—Agents.

No. 252. Mary M. Meikle and her Factor Loco Tutoris, Pursuers.—*Baird.*
Ann Meikle and her Tutor ad Litem, Defenders.—*More.*

March 7, 1823.

First Division. Lord Alloway. S.

Tutor and Pupil—Tack—Nobile Officium.—The late John Meikle obtained a lease of a farm at a rent of £660, besides various other obligations, for fourteen years, from Candlemas 1820, excluding assignees and sub-tenants, and destined, in the event of heirs-portioners, to the eldest daughter. Two years thereafter he died, leaving two daughters, viz. the pursuer, a child of about three years of age, and the defender, who was about two years old. His personal estate did not exceed £700, the free part of which he bequeathed to his wife; and the legitim of each of his children was only £116. The friends of the family considering that it would not only be inexpedient, but ruinous, to keep the farm, an offer was made to grant a renunciation of the lease to the landlord, of which he agreed to accept. A factor loco tutoris having been appointed to the eldest daughter, this action was brought to have it found,

that it was absolutely necessary to dispose of the lease, and that the factor ought to be authorized to renounce it. The Lord Ordinary ordered informations to the Court, who, after a report from a person of skill, 'that, to carry on the farm at the rent of '£660 per annum, would prove ruinous, and, in a 'very few years, would swallow up the whole stock 'or capital of £700 stated to be upon it;' decerned in terms of the libel.

Pursuers Authorities.—1. Erak. 7, 17; Plummer, Mar. 8, 1757, (16358); Hallows, Mar. 1, 1794, (14981); Colt, Mar. 6, 1800, (16387); 4. St. 3, 1; 4. Bankt. 7, 24; 1. Erak. 3, 22.

RENTON & GRANT, W. S.—G. TURNBULL, W. S.—Agents.

F. CONNALLY, Pursuer.—*Monteath.* No. 253.
J. M'NAUGHT and COMPANY, Defenders.—*Pyper.*

Cessio.—Decree of cessio in favour of the pursuer, which was opposed, on the ground that he had not sufficiently explained the causes of his insolvency.

March 7, 1823.
FIRST DIVISION.
D.

J. HAMILTON, W. S.—J. MORRISON, W. S.—Agents.

THE KING'S PRINTERS, Suspenders.—*Solicitor-General Hope—A. Bell.* No. 254.
MANNERS and MILLER and Others, Chargers.—*Cranstoun—Moncreiff—Marshall.*

King's Printer—Exclusive Privilege.—In 1785, the King, by a commission, or letters-patent under the union seal, after narrating a former grant of the office of King's printer, 'nosque certiores facti de fa-'cultatibus et qualificationibus Jacobi Hunter Blair,

March 7, 1823.
FIRST DIVISION.
Lords Gillies and Meadowbank.
D.

'armigeri, et Joannis Bruce, armigeri, ad promo-
'vendum dictum opus typographiæ conjunctim; et
'volentes (laudabili exemplo regiorum nostrorum
'prædecessorum) profectui artis adeo utilis, in ea
'parte dominiorum nostrorum, favere, benigne per-
'cupimus, ut tesseram regii nostri favoris in dictos
'Jacobum Hunter Blair, et Joannem Bruce, novam
'donationem dicti officii conferre,' nominated and appointed them, their heirs and assignees, for forty-one years, 'solos et unicos nostros architypographos, 'in illa parte regni nostri Magnæ Britanniæ, Scotia 'vocat.' 'Cum plena potestate ipsis Jacobo Hun-
'ter Blair, et Joanni Bruce, conjunctim, &c. ante-
'dict. præfato munere et officio, durante spacio ante-
'dicto, utendi, exercendi, et gaudendi, cum omnibus
'proficuis, emolumentis, immunitatibus, exemptioni-
'bus, et privilegiis, quibuscunq. eidem spectantibus,
'in quantum cum articulis Unionis, legibusq. Magnæ
'Britanniæ nunc existentibus, congruunt. Et spe-
'ciatim, solum et unicum privilegium imprimendi,
'in Scotia, Biblia Sacra, Nova Testamenta, Psalmo-
'rum libros, libros Precum Communium, Confessi-
'ones Fidei, majores et minores Catechismos in lin-
'gua Anglicana; necnon solam potestatem impri-
'mendi, et reimprimendi, acta Parliamenti, edicta,
'proclamationes, omnesq. alias chartas in usum nos-
'trorum publicorum in Scotia officiorum, imprimen-
'das: Et generaliter omne quod ibidem publican-
'dum erit, auctoritate regali, imprimendi, et reim-
'primendi: Prohiben. per præsentes, omnes alias
'personas quascunque, tam nativos quam extraneos,
'imprimere, vel reimprimere, seu imprimi, seu reim-
'primi in Scotia causare, vel importare, seu impor-
'tari facere in Scotiam, a quibusvis locis transmari-

'nis, ullos dict. librorum, et chartarum publicarum, 'supra mentionat. absq. licentia vel auctoritate a 'dict. Jacobo Hunter Blair, et Joanne Bruce, &c. 'sub pœna confiscationis.' For several years, a tacit agreement had existed between the King's printers in England and Scotland, of permitting the books printed by them respectively to be imported into and sold in the two kingdoms. The King's printers in England having at last excluded the Scottish Bibles, the King's printers in Scotland presented a bill of suspension and interdict against several booksellers from importing, selling, or exposing to sale, any of the books included in their commission, which were not printed at their press, or under their authority. The bill having been passed, Lord Gillies repelled the reasons of suspension; but, on a representation, Lord Meadowbank reported the case, and a hearing in presence was ordered. By the Booksellers, it was maintained,—1. That the right conferred by the commission was merely that of printing, and not of selling; 2. That it was qualified by the terms of the articles of Union, establishing a free trade between the two kingdoms; and, 3. That the prohibition against importation was directed only against books brought 'a quibusvis locis transmarinis,' which could not apply to England. On the other hand, the Printers contended,—1. That the right of printing and publishing the Sacred Scriptures, and the other books mentioned in their commission, is a royal prerogative confided to the Crown, in order to insure purity and correctness; 2. That the Crown having delegated to them the prerogative right of printing, this necessarily carried with it the co-relative right of preventing the interference of others, and, consequently, the

privilege of original sale; and, 3. That the prohibitive clause being intended to protect, could not be construed so as to limit the right; that the terms 'a 'quibusvis locis transmarinis,' meant foreign countries, which included England; and that the articles of Union must be understood as to the subjects in general, and not so as to affect lawful grants of prerogative rights. The Court (by a majority) sustained the reasons of suspension, and granted interdict.

Suspenders Authorities.—1551, c. 27; Mack. Ob. 153; 1. Bankt. 2, 25; 4. Bankt. 22, 1; 1. Ersk. 5, 6; 1584, c. 129; 1592, c. 114; 1690, c. 15 and 23; 1700, c. 2; 1702, c. 3; 1703, c. 2; 1707, c. 6; 4. Bur. 2303; 5. Bac. Ab. 594 and 598; Baskett. 1717; (Rob. Ap. Cases, 197;) K's Printer, May 22, 1790, (8316); 1. Blackst. 456; 1. Burns, Ec. Law, 86; Univ. of Oxford v. Richardsons 1802, 1804, (Ho. of Lords).*

Chargers Authorities.—Collier on Pat. 16; 21. Jac. 1, c. 3; Rese. St. 1641, c. 63; 1. Bell, 67; 1551, c. 27; 8. Anne, c. 19; Lindsay, Jan. 5, 1683, (Fount); 1. Bell, 68; 2. Blackst. 410; 2. Ersk. 5, 84; Coppersmiths of Edinburgh, Aug. 6, 1768, (1966); Goldsmiths of Edinburgh, Mar. 2, 1802; (Ap. Burgh, R. No. 10.); Bakers of Haddington, June 10, 1807, (Ib. No. 22, note); Bakers of Perth, July 5, 1808, (Ib. No. 22.); Paterson, Dec. 6, 1810, (F. C.); 1. Blackst. 263; Smith, Dec. 16, 1757, (1952).

J. Bell, W. S.—A. Manners, W. S.—Agents.

No. 255.

A. Reid, Petitioner.—*More.*
A. B., (a Creditor), Respondent.—*Jameson.*

March 7, 1823.

Second Division.

B.

Bankrupt—Sequestration—Composition.—Reid having been sequestrated, offered a composition of 1s. in the pound, payable six months after approval, at a meeting of creditors held 1st October 1819, which was afterwards approved of by a second meeting held on the 22d October. Having applied to the Court

* A full report of this Case, is in the Appendix to the Papers.

for approval, one of the creditors objected,—1. That the second advertisement of the meeting of the 22d October, appeared in the Gazette on the 8th, being the 14th day before the meeting, which, he contended, was not a compliance with § 59 of the bankrupt-act, which requires, that notice shall be given, 'by 'advertising the same twice in the said newspaper, 'and, by putting into the post-office, &c. printed 'notices, addressed to each of the creditors, a fort-'night at least before the proposed meeting.' 2. That the composition not being payable till six months after approval, the petitioner was not entitled to have delayed applying to the Court so long after the creditors had agreed to accept it. The Court repelled both objections, and approved of the composition.

The Court held the above clause to apply only to the time of putting the notices into the post-office, and not to the advertisements.

D. Ballingal,—G. Macdowall,—Agents.

C. Fraser, Suspender.—*Cuninghame.*
G. Petre, Charger.—*Pyper.*

No. 256.

Landlord and Tenant—Straw of Waygoing Crop.— Fraser presented a bill of suspension and interdict against Petre, his tenant, from disposing of the straw of his waygoing crop, as he was bound, by his lease, 'to consume, on the farm, all the straw and the dung 'which may grow or be made thereon.' The Lord Ordinary refused the bill; but the Court, in respect that there were other similar cases at present de-

March 7, 1823.

Second Division. Bill-Chamber. Lords Cringletie and Mackenzie. F.

pending, passed the bill, to the effect of trying the question.

J. J. Fraser, W. S.—John Morrison, W. S.—Agents.

No. 257. The Hon. C. Fleming, Suspender.—*Cranstoun—Murray.*
J. Buchanan, Charger.—*Moncreiff—H. J. Robertson.*

March 7, 1823.

Second Division. Bill-Chamber. Lord Mackenzie. B.

Sale.—Fleming purchased from Buchanan, certain superiorities, as being in the county of Stirling, for the purpose of making votes in that county. He suspended payment of the price, on the ground, 1. That the lands were described, in the crown charter, as lying within the county of Stirling; but that, in the titles of the vassals, (granted by Buchanan himself), they were described as lying within the 'county 'of Perth, by annexation;' 2. That the decreet of sale, by which Buchanan obtained right to the lands, only adjudged 'the superiority, feu-duty,' &c. but not the lands themselves. To this it was answered, (and was admitted), 1. That as to jurisdiction, cess, public burdens, and every thing but the taking of infeftment, the lands formed part of the county of Stirling; 2. That freeholders are not entitled to look beyond the charter and infeftment, which were not objected to; and, besides, that a conveyance of the 'su-'periority,' per expressum, is perfectly valid. The Lord Ordinary having, at the request of the parties, reported the case, the Court refused the bill.

Suspender's Authorities.—(2.)—2. St. 4, 1-7; 2. Bankt. 4, 1-2.
Charger's Authorities.—(1.)—Election of Dumfriesshire, Feb. 10, 1741; (Elchies, 4, Mem. of Parl.)—(2.)—Laird of Lagg, Nov. 19, 1624, (13787);

Baron Norton, July 6, 1813, (F. C.); Hamilton, Feb. 23, 1819; M'Kenzie, Dec. 14, 1822; (Ante, Vol. II, No. 86.)

GEO. DUNLOP, W. S.—M'KENZIE & INNES, W. S.—Agents.

JAMES ADAM, Petitioner.—*J. W. Dickson.* No. 258.
MAGISTRATES of FORFAR.—*Greenshields,*
And,
W. HUNTER, Respondents.—*Fullerton—Gillies—Shaw,*

March 7, 1823.

SECOND DIVISION.
F.

Public Officer—Town-Clerk.—During the dependence of the case, noticed ante, Vol. I, No. 458, an application was made to the Court by the procurators of Forfar, to have an interim town-clerk appointed. The Magistrates concurred with them in recommending Hunter, who was accordingly appointed by the Court; 'reserving to James 'Adam, to claim the whole dues and emolu- 'ments of that office, from the said William Hun- 'ter, in case he shall be found to have right thereto.' After the decision in that case, Adam petitioned the Court to recal Hunter's appointment, and to find that he was entitled to three-fourths of the emoluments of the office, since Hunter's appointment. The Court recalled Hunter's appointment, and found Adam 'entitled to three-fourth parts of the whole 'fees and emoluments properly belonging to the of- 'fice of town-clerk of Forfar, received by the re- 'spondent, during the time of his acting as depute- 'clerk, with interest, at the rate of four per cent. on 'the amount thereof, from the end of each year re- 'spectively,'—reserving to Hunter 'to claim from 'the Magistrates and town of Forfar, his claims of 'relief for expences, and also, for what further al-

'lowance may seem due to him from them; and to 'the Magistrates and town, their defences as ac- 'cords.'

CHAS. GORDON—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

No. 259. Mrs. C. AITKEN, or FORD, Petitioner.—*Greenshields.*
C. GREENHILL, (Trustee for J. Ford's Creditors), Respondent.—*Buchanan.*

March 8, 1823.

FIRST DIVISION. D.

Appeal—Interim-Execution.—Greenhill having appealed against the judgment of the Court, affirming that of the commissaries, in an action of divorce, at the instance of Mrs. Ford, against her husband, finding adultery proved, (see ante, Vol. I, No. 336), she applied for interim-execution, on the ground, that she had been ranked as a creditor, on her husband's sequestrated estates, for certain provisions due to her on the dissolution of the marriage; and that, as a dividend had been struck, she was now entitled to payment. To this it was objected, 1. That the judgment related merely to a question of status, and was, therefore, not susceptible of execution for any sum of money; 2. That no decree of divorce had been pronounced; and, therefore, ulterior proceedings in foro were necessary; and, 3. That her right to payment of the dividend was sub judice of the Second Division. The Court refused the petition.

R. RATTRAY, W. S.—T. DEUCHAR,—Agents.

PROCURATORS of PAISLEY, Objectors.—*Jeffrey—More.*
J. CRAIG, Respondent.—*Bell—Shaw.*

No. 260.

March 8, 1823.

FIRST DIVISION. D.

Public Officer—Notary-Public.—Craig, a messenger, applied to be admitted a notary-public; underwent the usual examinations; and obtained a report in his favour. Appearance was then made by the faculty of procurators of Paisley, who objected to his admission, alleging, that he had not received a regular legal education,—that he was ignorant of law, of Latin, and of grammar,—that he was now upwards of thirty-five years of age,—that he had been originally a weaver, and at one time bankrupt,—that he was the father of two natural children, and had, without being licenced, acted as an agent before the inferior courts. To this it was answered, 1. That the faculty had no title to appear in their corporate capacity; 2. That the report of the examinators must be held as conclusive evidence of his qualifications; and, 3. That the allegations as to his moral character, were vague and irrelevant. The Court, after having, before answer, allowed a condescendence, (which was given in by the procurators as individuals), and, at the request of Craig, having remitted to the examinators to report specially, repelled the objections, and found Craig entitled to expences.

Objectors' Authorities.—M'Aulay and others, Feb. 13, 1783, (13137); Mitchell, Dec. 7, 1815, (F. C.); 1587, c. 45; 41. Geo. III, c. 79; 1. and 2. Geo. IV, c. 36.

Respondent's Authorities.—Pro. of Glasgow, June 6, 1816; 2. Hume, 116.

A NAIRNE,—W. PATRICK, W. S.—Agents.

No. 261. J. LETHAM, Pursuer.—*Greenshields—Jeffrey—Dundas.*

ELIZABETH PROVAN or LETHAM, Defender.—*Forsyth.*

March 8, 1823.

FIRST DIVISION. Lord Kinedder, S.

Jurisdiction—Commissary—Husband and Wife.—The parties in this case were married on the 14th of June 1814, and on the 23d of March 1815, a servant maid was delivered in the house of a child, of which Letham was the father. His wife then raised an action of separation a mensa et toro, and for aliment, before the inferior commissary-court, founding on maltreatment and adultery; and Letham instituted a counter-action of adherence, which, on his motion, was conjoined with the other. After a judicial examination of Letham, in which he admitted that he was the father of the child, and that the woman was still residing in his house, the commissary decerned in the original action, and assoilzied from that for adherence. Of this decree Letham brought an action of reduction, on the ground, 1. That the inferior commissary had no jurisdiction in questions of adultery. 2. That adultery was only relevant to infer divorce, and not separation and aliment; and, 3. That the child had been begot prior to the marriage. The Lord Ordinary repelled the reasons of reduction, and, on a representation, found, 'That, during 'the dependence of the action of aliment brought 'by the respondent before the commissary of Glas- 'gow, the representer raised a counter-action of ad- 'herence before the same court, and that those ac- 'tions, upon his own motion, were conjoined; and, 'therefore, finds it unnecessary to determine whe-

'ther the action of aliment was competent, in re-
'spect the representer is barred, by his own proceed-
'ings, from pleading its incompetency; finds, that a
'maid-servant, with whom the representer had had
'a criminal intercourse, was allowed to continue in
'family with him at the time of his marriage; and
'that, after the respondent, on knowing the fact,
'had justifiably withdrawn from his society, the
'same person was retained in his family, or was
'brought back to it; and finds, that this gross dere-
'liction of his duties as a husband, entitled the re-
'spondent to withdraw finally from his society.' The Court adhered.

Pursuer's Authorities.—Instr. to Com. 1666, c. 26; D. of Gordon, June 8, 1697, (5902).
Defender's Authority.—Foulis, Dec. 21, 1626, (6158).

GREIG & PEDDIE, W. S.—D. FISHER,—Agents.

C. FERRIER, Trustee on the Estate of the Scotch Patent Cooperage Company, Pursuer.—*Blackwell.*
A. WALLACE and Others, Defenders.—*Bell—Alison.*

No. 262.

March 8, 1823.

SECOND DIVISION.
Lord Pitmilly.
F.

Sale.—Wallace and others purchased the right to a lease of part of the sequestrated estate of the Scotch Patent Cooperage Company. In an action at the instance of the trustee, concluding for implement of the bargain, or, alternatively, that Wallace, &c. should be ordained to grant a bond for payment, with sufficient caution, in terms of the articles of roup, they pleaded, in defence, that one of a series of assignations, which formed the progress of titles to the lease, was amissing, which assignation bore, in gremio, a burden on the lease of greater amount than

the price stipulated to be paid by them,—and that, until that defect in the title was remedied, they could not be bound either to pay the price, or grant a bond with caution. The Lord Ordinary decerned in terms of the alternative conclusion. Wallace, &c. petitioned, praying to be authorized to consign the price, which the Court appointed to be done, reserving all questions.

JAMES SWAN, W. S.—J. G. HOPKIRK, W. S.—Agents.

No. 263. Mrs. BAILLIE and Others, Complainers.—*Clerk—Skene—Lockhart.*
Mrs. WADDELL and Others, Respondents.—*Cockburn—Bruce.*

March 8, 1823.

SECOND DIVISION. F.

Summary Complaint.—This was a branch of the case, ante, Vol. I, No. 416, and was a complaint at the instance of Baillie and others, accusing Waddell and others of having vitiated a parish record, and attempted to suborn witnesses, for the purpose of succeeding in a competition of brieves depending between them, before the macers. The Court allowed a proof, in which the complainers failed to establish their allegations, and the complaint was, accordingly, dismissed; reserving, however, 'to the parties, or either of 'them, to found on any part of the proofs referred 'to in this question, omni habili modo, in any other 'question that may be agitated betwixt them.'

D. M'LEAN, W. S.—D. HORNE, W. S.—TAIT & BRUCE, W. S.—Agents.

STEPHENSON'S TRUSTEES, and T. STEPHENSON, Pursuers.—*Cuninghame—Cathcart.*
Marquis of TWEEDDALE, Defender.—*Clerk—Murray.*

No. 264.

March 11, 1823.

FIRST DIVISION.
Lord Alloway.
S.

Process—Title of Party to Withdraw.—In an action at the instance of Stephenson's Trustees against the Marquis of Tweeddale, the Lord Ordinary pronounced a judgment against him; and the Court, on the 16th January 1823, adhered. A minute was then lodged by T. Stephenson, (without any prior notice to the Marquis, or any interlocutor permitting it), stating, that the trust was for his behoof, till he attained majority; that having arrived at that period, he had discharged the trustees, and had now the sole interest in the process; and, therefore, praying to be sisted as the only pursuer. The Court sisted him, 'and allow the cause to be carried on in his sole 'name.' After a reclaiming petition had been refused, (see ante, Vol. II, No. 178), and the case had returned to the Lord Ordinary, the Marquis entered an appeal, and obtained an order of service on the *trustees*, which he executed. T. Stephenson, alleging that he was now sole pursuer, and that this appeal could not affect him, insisted on proceeding with the action. To this the Marquis objected, That the original pursuers could not withdraw without his consent; that he had not been made aware of the minute being lodged; and that, by the appeal, the whole case was carried to the House of Lords. On report of the Lord Ordinary, the Court found, that the trustees could not withdraw without the consent of the Marquis; but, (of consent), allowed Stephenson to be sisted as a joint pursuer.

J. TWEEDIE, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

No. 265.

J. MACKISON, Advocator—*A. M'Neill.*
W. MACKISON, Respondent.—*Gillies.*

March 11, 1823.
SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
B.

The Court adhered to the Lord Ordinary's interlocutor passing a bill of advocation without caution, ob contingentiam, the contingency being quite clear.

D. GIBSON,—CAMPBELL & CLASON, W. S.—Agents.

No. 266.

G. LYELL, Suspender.—*Bell—Ro. Bell.*
Mrs. M. CHRISTIE and Others, Trustees of the late T. Christie, Chargers.—*L'Amy—Skene—Ivory.*

March 11, 1823.
SECOND DIVISION.
Bill-Chamber.
Lord Cringletie.
B.

Assignation—Accession to Trust.—The late T. Christie having charged Jameson on his bond, he brought a suspension, in which Lyell became cautioner. The letters were ultimately found orderly proceeded; and Christie, shortly before his death, executed a special assignation of his claim against Jameson, with 'all action and execution that has already followed, or is competent to follow thereon,' in favour of trustees, who, after Christie's death, charged Lyell on his cautionary obligation. He presented a bill of suspension, on the grounds,—1. That the trustees, not having confirmed, had no title to the deceased's claim against him; and, 2. That, having claimed and received partial payments under a trust-deed executed by Lyell for behoof of his creditors, they had virtually become parties to a relative deed of accession, by which the creditors had bound themselves to abstain from diligence. It was answered for the trustees,—1. That the special assignation to Jameson's debt carried with it the right to the bond of caution granted by Lyell, in the

suspension of the charge for that debt; and, 2. That the trust-deed and accession were only to be binding in the event of all the creditors acceding, and that there were some who had not acceded; and, besides, that the trust-deed had been superseded by a subsequent sequestration. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

Suspender's Authority.—(1.)—Findlayson, March 26, 1623, (23).
Chargers Authorities.—(1.)—S. St. 1, 17; 3. Erak. 5, 8; Cultie and Hunter, Feb. 3, 1676; (2. St. 409); Wilson, Feb. 28, 1751, (41).

JAS. BURNESS,—A. DOUGLAS, W. S.—Agents.

J. WATT, Advocator.—*Blackwell.*
Honourable Mrs. MAITLAND MACGILL, Respondent.
—*Jardine—D. Maitland.*

No. 267.

March 11, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

Possessory Judgment.—In an application at the instance of Mrs. Maitland Macgill, to have Watt and his tenant interdicted from encroaching on or possessing a small piece of ground claimed by each of the parties, who were neighbouring proprietors, the Sheriff, after allowing a proof as to the possession, granted the interdict. Watt advocated, on the ground, that the Sheriff had admitted, as witnesses for Mrs. Maitland, her tenant, who was in possession of the ground in dispute, and his son; and also, that the possession of Mrs. Maitland's tenant, founded on, was vitious. The Lord Ordinary being satisfied, that, independent of the evidence objected to, there was sufficient proof of uninterrupted possession for seven years, remitted simpliciter. Watt petitioned, praying that the advocation should, at least, be conjoined to an action of declarator he had raised of his

right to the ground in dispute; but the Court adhered.

CAMPBELL & MACK, W. S.—JAMES HERIOT, W. S.—Agents.

No. 268. J. GRAHAM, Pursuer.—*Cockburn—Burn Murdoch.*
A. GRAHAM, Defender.—*More.*

March 11, 1823.
SECOND DIVISION.
Lord Cringletie.
M'K.

Process.—On the marriage of John Graham, he and his father, (the defender), bound themselves to *secure* certain sums in favour of the spouses, and their children. Graham raised action on this contract against his father, concluding for *payment* to himself of the interest on the sums. Against this action, it was pleaded,—1. That the contract was cancelled; and, 2. That Graham was the principal obligant, and the defender merely cautioner. The Lord Ordinary sustained the defences. The Court recalled the interlocutor, and dismissed the action as incompetently laid, there being no obligation under which payment could be enforced.

W. DICKSON, W. S.—GEO. DUNLOP, W. S.—Agents.

No. 269. Dr. R. TAINSH, Pursuer.—*Burn Murdoch.*
A. GRAHAM, Defender.—*More.*

March 11, 1823.
SECOND DIVISION.
Lord Cringletie.
M'K.

This was an action for implement of the contract mentioned in the above case, by Dr. Tainsh, at whose instance action was to pass for behalf of John Graham's wife and children. The Lord Ordinary had appointed a condescendence, as to an alleged cancelling of the contract; and Dr. Tainsh petitioned to have this action conjoined with the other. The

petition was superseded till that case should be advised, and it was then refused.

W. Dickson, W. S.—Geo. Dunlop, W. S.—Agents.

W. Brock, (A. Newbigging and Company's Trustee), Petitioner.—*Clerk—Moncreiff—Ivory.*
W. B. Cabbell, &c. for the Glasgow Bank, Respondents.—*Cranstoun—Jeffrey—D. M'Farlane.*

No. 270.

Interim-Execution.—Brock applied for interim-execution as to expences, pending appeal of the case, ante, Vol. II, No. 54, and for authority to sell the subject in dispute. The Court granted the prayer as to expences, but refused quoad ultra.

March 11, 1823.

Second Division. M'K.

Gibson, Christie, & Wardlaw, W. S.—T. Johnstone,—Agents.

C. Greenhill, Complainer.—*Greenshields—Neaves.*
J. F. Gordon, W. S. Respondent.—*Baird—Cockburn.*

No. 271.

Judicial Factor.—Greenhill presented a complaint against Mr. Gordon 'as judicial factor on the estate 'of Carse.' It appearing, however, that Mr. Gordon was not a judicial factor, the Court dismissed the complaint.

March 11, 1823.

Second Division. M'K.

The complainer founded on an interlocutor of the Lord Ordinary, appointing Mr. Gordon to uplift the rents of the estate; but, besides that this had never been extracted, it was observed, that a 'judicial factor' could be appointed only by the Court.

T. Deuchar,—D. Brown, W. S.—Agents.

THE CASES

DECIDED IN

THE COURT OF SESSION,

SUMMER 1823.

S. REID, Suspender.—*Jeffrey—Cockburn—More.* No. 272.
EDINBURGH GAS LIGHT COMPANY, Chargers.—
Cranstoun—Jameson.

May 13, 1823.

FIRST DIVISION.
Lord Meadowbank.
D.

Society.—By the prospectus of the Edinburgh Gas Light Company it was proposed to raise a capital of £20,000, to be divided into 800 shares of £25 each, and it was stated, that, 'as it is almost certain, that 'an enlargement of the works will be wanted and 'called for, in order to embrace the lighting of the 'whole of the old and new extended royalty, and 'places adjacent, the additional capital requisite for 'that purpose may be raised by the creation of new 'stock, also in shares of £25 sterling each. The sub-'scribers and their successors to the original capital of '£20,000 having the preference of taking the new 'stock in proportion to the shares they hold in the 'old.' Afterwards an Act of Parliament was obtained, by which certain persons there named, 'and

'all and every such other person or persons, &c. as 'have already become subscribers, or from time to 'time shall subscribe, and be duly admitted members 'into the said Company, and their respective suc- 'cessors, &c. shall be, and they are hereby declared 'to be one body politic and corporate, by the name 'of the Edinburgh Gas Light Company.' After appointing £100,000 to be raised for the purposes of the Company, it is enacted, 'that the said sum of '£100,000, or so much thereof as shall be raised, 'shall be divided into shares of £25 each; and that 'the said shares shall be, and are hereby vested 'in the several persons so raising and contributing 'the same, &c. who have already, or shall severally 'subscribe for one or more share or shares,' on which, after certain deductions, they were to receive 'the en- 'tire and nett distribution of an equal proportional 'part, according to the money so by them respectively 'paid, of the profits and advantages which shall and 'may arise and accrue from the sums of money to be 'raised,' &c. The capital of £100,000 was ordered to be raised among the proprietors themselves, and it was enacted, 'That the property of and in the said under- 'taking, and profits arising therefrom,' &c. is and are 'hereby vested in the said Company of Proprietors, 'and they shall severally and respectively be entitled 'thereto, in such shares and proportions, and in the 'manner prescribed by this Act.' Of the capital stock, £15,000 were sold under an express reservation in favour to the original proprietors of the preference in the prospectus; and afterwards £18,000 were disposed of, but without any such qualification. Reid purchased shares of the £18,000 at an advanced price of £32 a share, and thus became a proprietor.

It being necessary to dispose of the remaining part of the stock, and shares having greatly increased in value, the original subscribers claimed right under the reservation in the prospectus, to purchase it at £25, to the exclusion of all the others. This was resisted by those who had bought shares of the £18,000; and, in order to try the question, a bill of suspension and interdict was presented by Reid against the sale, which was passed, and the case reported to the Court. The original subscribers maintained, that the prospectus was the contract by which the Company was constituted; and that they were entitled to the right there reserved to them. By Reid it was contended, 1. That the prospectus was superseded by the Act of Parliament, and that it must be disregarded, 2. That the statute was the contract; and that, as it gave no privilege to any class of proprietors over the others; and, as he had purchased his shares without any qualification, he was entitled to all the rights bestowed by the statute. The Court sustained the reasons of suspension, and granted interdict.

It was agreed on the Bench, that the prospectus must be thrown out of view; and that the statute was the contract of the Company.

Burns & Allester, W. S.—Inglis & Weir, W. S.—Agents.

No. 273. THOMAS SCOULAR, Petitioner.—*Forsyth.*
ROBERT AITON, (Trustee on Scoular's sequestrated estate), Respondent.—*Jameson—J. Miller, Junior.*

May 13, 1823.
SECOND DIVISION.
B.

Bankrupt—Sequestration—Discharge.—Scoular, a sequestrated bankrupt, whose estate had yielded no dividend, offered to pay to his creditors the expences of the sequestration, but without any composition on his debts, on condition of a discharge. The requisite number of creditors having accepted of this offer, Scoular applied to the Court for a discharge, which was opposed by Aiton, the trustee, on the ground that the bankrupt having neither offered any composition, nor paid any dividend, a discharge was incompetent. The Court sustained the objection, and refused the discharge.

RO. RUTHERFURD, W. S.—CAMPBELL & CLASON, W. S.—Agents.

No. 274. RENTON and GRANT, W. S. Pursuers.—*Moncreiff—Ivory.*
JOHN REID and Others, Defenders.—*Maidment.*

May 13, 1823.
SECOND DIVISION.
Lord Pitmilly.
M'K.

Sequestration—Agent's Expences.—Reid, having been sequestrated, was discharged on payment of a composition, under an agreement that he should be entitled to call the trustee to account for his intromissions. Renton and Grant, W. S. agents employed by the trustee, raised action against Reid and his cautioners, for payment of the law expences incurred under the sequestration. Reid defended on the ground, that the trustee by whom they were employed, had never accounted to him for his intromissions.

But the Lord Ordinary and the Court held, that the agents regularly employed under the sequestration could not be affected by any claims which might be competent to the bankrupt against the trustee, and decerned against Reid.

RENTON & GRANT, W. S.—J. M'ARA, W. S.—Agents.

GEORGE YOUNG, Pursuer.—*Baird.* No. 275.
Q. JOHNSTON, Defender.—*Brownlee.*

May 13, 1823

SECOND DIVISION.
Lord Cringletie.
B.

Expences.—This was a dispute as to whether an interlocutor of the Lord Ordinary, which had been acquiesced in, found Johnston liable in the whole, or only in half of the expence of auditing certain accounts. The Lord Ordinary, by a subsequent interlocutor, held, that it had imposed the whole expence on Johnston, and the Court adhered.

F. FRASER,—T. MEGGET, W. S.—Agents.

J. WALLACE and Others, Members of the Old Monkland Weavers Society, Pursuers.—*A. Wood.* No. 276.
J. WALKER and Others, Office-Bearers of the Society, Defenders.—*Forsyth.*

May 13, 1823.

SECOND DIVISION.
Lord Pitmilly.
B.

Expences.—In two law-suits, carried on by the office-bearers and a majority of the Old Monkland Weavers Society, the Court had found that no part of the expences should form a burden on the funds of the Society. Notwithstanding this, these expences were entered in the society books by the office-bearers as a charge against the society; in consequence of which, Wallace and other members raised action against the office-bearers, to have it declared, that the so-

ciety should be relieved of these expences. The office-bearers entered defences, and continued to litigate the question for some years, and, in the meantime, gradually paid up to the society, by voluntary contributions, the expences in dispute, which were entirely liquidated at the date of the Lord Ordinary's final interlocutor decerning in terms of the conclusions of the libel, and finding the office-bearers liable in expences of process. They reclaimed as to the decerniture of expences, but the Court adhered.

CARNEGY & SHEPHERD, W. S.—J. GRANGER, W. S.—Agents.

No. 277. MISSES BROWNS, Suspenders.—*Solicitor-General Hope—Cranstoun.*
T. BURNS, Charger.—*Jeffrey—More.*

May 14, 1823.

FIRST DIVISION. Lord Meadowbank. D.

Superior and Vassal—Personal Objection—Servitude.—The late Mr. Brown, superior of the ground on which George's Square, (Edinburgh), and adjacent streets are built, feued to the author of Mr. Burns, a dwelling-house in George's Square, with the back court and stable, and coach-house, declaring that the 'possessors of the said dwelling-house and pertinents 'shall be perpetually limited and restrained from 'dealing in, or the occupation of any trade or mer-'chandise, whether foreign or inland, in wholesale 'or retail, of goods, or vivers of any sort or denomina-'tion, and from baking and brewing for sale, and from 'the occupation of any kind of handicraft.' Mr. Brown introduced a similar clause into all the feu-contracts of the neighbouring streets, and particularly of Charles's Street; but, notwithstanding, the lower flat of the houses built in that street had, with-

out objection, been made into shops; and the stables and coach-house above mentioned had for some time been occupied as a wright's work-shop. Mr. Burns having begun to erect on the back court of his house in George's Square, a large tenement fronting to Charles's Street, the lower flat of which he proposed to convert into shops, Misses Browns, as superiors, suspended, and prayed for an interdict, on the above clause: Burns pleaded, 1. That they had no interest to object, 2. That by having permitted the clause to be departed from in every other instance, and having delayed to complain till the shops were built, they were barred personali exceptione from now enforcing it. The Lord Ordinary, in respect 'that it is not disputed, that the charger was entitled to erect the building containing the shops now complained of,—that no appearance is made for any of the feuars in George's Square complaining of the operations in question,—and that the suspenders, the superiors, have qualified no interest to enforce the obligation contained in the charter against occupying the premises entered from Charles's Street as shops, and are barred personali exceptione from complaining thereof,' repelled the reasons of suspension; and the Court adhered.

Charger's Authority.—2. Ersk. 9, 13.

R. Mercer, W. S.—Burns & Allester, W. S.—Agents.

No. 278. D. STEEDMAN, Pursuer.—*Ro. Thomson.*
H. CAMPBELL and Others, Defenders.—*J. Wilson. Junior.*

May 14, 1823.
FIRST DIVISION.
D.

Cessio.—Decree of cessio refused because the pursuer had not made a satisfactory disclosure of the state of his affairs.

R. & J. HOTCHKIS, and J. MEIKLEJOHN, W. S.—D. BRASHE, —Agents.

No. 279. W. MONRO, Suspender.—*Keay—Pyper.*
J. MONRO, Charger.—*Solicitor-General Hope.*

May 14, 1823.
FIRST DIVISION.
Bill-Chamber.
Lord Alloway.
H.

Compensation.—W. Munro having been charged on his accepted bill, at the instance of the drawer, presented a bill of suspension, on the ground, that he had a counter-claim for meliorations under a lease to which he pretended to have right. The Lord Ordinary refused the bill; and the Court not being satisfied of the suspender's right to the lease, adhered.

MACMILLAN & GRANT, W. S.—J. FORMAN, W. S.—Agents.

No. 280. Sir M. SHAW STEWART, Pursuer.—*Moncreiff—Shaw Stewart.*
L. HOUSTON and Others, Defenders.—*Forsyth—Blackwell—Marshall.*

May 14, 1823.
SECOND DIVISION.
Lord Cringletie.
F.

Superior and Vassal—Multiplication of Superiors—Prescription.—The Earls of Glencairn were superiors of the lands of Overmains and others in the

county of Renfrew, the dominium utile of which was possessed by the family of Porterfield of Duchal. A right of mid-superiority of these lands belonged to the Maxwells of Newark, the last entry to which had been in the year 1701, but the personal right to which had been regularly transmitted, by services and dispositions, till it was vested, in 1817, in the person of the pursuer, Sir M. Shaw Stewart.

In 1757, William Earl of Glencairn, the superior, overlooking the mid-superiority sold (under the 20. Geo. II, c. 50), to Porterfield of Duchal, as his immediate vassal, the dominium directum of the lands. Porterfield obtained a crown-charter, and conveyed the dominium directum, in two separate portions,—the one to Campbell of Shawfield, in liferent, and the other to Graham of Gartmore, also in liferent, and both to the Earl of Glencairn in fee. These persons were all severally infeft in their respective rights, and the two liferenters were inrolled as freeholders in the county of Renfrew, but had no other possession. In 1778, Mr. Graham renounced his liferent; and the Earl of Glencairn obtained a new charter from the crown, to himself in fee, and to John Cuningham, his second son, in liferent, whereon they were both infeft. In the year following, Mr. Campbell's liferent was also renounced, and a new charter was obtained, to the Earl in fee, and to Bontine of Ardoch in liferent. The fee of these superiorities having been conveyed, by James, the next Earl of Glencairn, to trustees, along with all his other property, was purchased, in 1790, by the Countess of Glencairn. In 1791, the liferent conveyed to Bontine of Ardoch was renounced, but

that disponed to Mr. Cuningham subsisted till 1796, when it also was renounced. The Countess, in the meanwhile, (1794), obtained a charter to these superiorities; and, in 1795, sold a part of them to Mr. Tod, and the remainder to Mr. Bissland in 1798, but in a different division from that in which the previous liferent rights had existed. These superiorities having come, by a progress of onerous titles, into the persons of Houston and others, they were infeft, and inrolled as freeholders of the county. A few years afterwards, however, Sir M. S. Stewart having acquired right to the mid-superiority, raised an action of reduction of the titles of Houston, &c. on the ground of the multiplication of superiors over him as vassal. Houston, &c. pleaded in defence, 1. That the superiority having continued split by the several successive liferent-rights since the year 1758, the vassal was barred by the negative prescription from challenging their titles, although their particular rights had not stood for forty years; and, 2. That the superior having possessed the fee of the superiority in a divided state, (though in his own person) for more than forty years, had acquired right by the positive prescription to divide the superiority. The Lord Ordinary found, that the right to challenge the division of the superiority 'has 'been cut off by the negative prescription, while the 'right to possess the superiority, as divided, has 'been acquired by the positive prescription,' and assoilzied the defenders. But the Court altered, and reduced in terms of the libel.

Their Lordships held, that there having been no pos-

session on the superiority as divided, there could be no room for the positive prescription, even if the fee could be considered to have been divided in 1758; and that the privilege of challenging rights to lands in themselves null, could not be lost by the negative prescription, unless acquired, on the other hand, by the positive, and besides, that the vassal was not called on to challenge any division of the life-rent, but only of the fee of the superiority.

Pursuer's Authority.—3. Ersk. 7, 8.

Defenders' Authorities.—Ayton, July 1, 1800, (Ap. Property, No. 5); Ayton, May 1801, (Ap. Property, No. 6); M. of Aberdeen, May 20, 1820, (F. C.); 3. Ersk. 7, 9; Murray, March 17, 1707, (10721); Earl of Leven, Dec. 26, 1711, (10930); Duke of Buccleuch, Aug. 5, 1768, (10711).

W. Patrick, W. S.—J. Smyth, W. S.—Agents

R. M'Lachlan, Pursuer.—*Cranstoun—Menzies.*
C. Tait, Defender.—*J. Tait.*

No. 281.

May 14, 1823.

Second Division. Lord Pitmilly. B.

Superior and Vassal—Composition for Entry of Singular Successors.—The Court having decerned in an action of non-entry at the instance of Mr. M'Lachlan against his vassal, Mr. Tait, (see ante, Vol. II, No. 67), a question arose, whether Mr. Tait was entitled to an entry, on payment of double the feu-duty, or whether he was bound to pay a year's rent. The lands had been feued by Mr. M'Lachlan's ancestor, in 1702, to Campbell, the ancestor of Mr. Tait's author, by a disposition which declared that the lands should be holden of the granter, 'for yearly 'payment of the sum of fyve marks good and usual 'money of this realme, in name of feu-duty, and 'doubling the foresaid feu-duty the first year of the 'entry of each air and successor to the lands, &c.

' above written, as use is.' By this disposition, the superior further bound himself, ' his heirs, &c. to receive ' the said Colin and Dugald Campbell, their nearest ' lawful heirs-male, and assignees, as immediate vassals in the said haill lands, &c. by precepts of clare ' constat, charters of confirmation and resignation, or ' such other forms as shall be for the time most agreeable to the laws and practice of this realm, and that ' gratis, without any manner of composition, &c. to ' be paid therefor, excepting allenarly, the doubling ' of the foresaid feu-duty the first year of the entry ' of each heir or singular successor thereto, in manner above written.' This disposition contained neither precept of sasine nor procuratory of resignation; but of the same date, and ' pro impletione et obser- ' vatione cujusdem literæ dispositionis,' a charter of the land was granted, to be holden feu, for payment of the feu-duty therein mentioned, ' et duplicando ' dictam feodifirmam primo anno introitus cujuslibet ' heredis vel successoris ad prædictas terras, &c. ut ' usus est feodifirmæ.' Infeftment followed on this charter, and all the subsequent investitures were taken in the same terms. Mr. Tait, who was the first singular successor, maintained, that he was not liable in a year's rent, but only in a duplicando of the feu-duty, because, 1. The disposition and charter being relative deeds, the general term, successors, in the latter, must be held to mean singular successors expressed in the former; and, 2. That, at all events, the disposition imposed an obligation on Mr. MacLachlan, as representing the granter, to accept of a duplicando. On the other hand, Mr. M'Lachlan contended, 1. That the terms in the disposition meant only purchasers prior to infeftment, and that those

in the charter applied only to heirs; and, 2. That the possession of Mr. Tait's authors having been for more than 40 years exclusively on the charter, he could not revert to the disposition, and that he had acquired no title to the obligation in it. The Lord Ordinary found, 'that the pursuer is entitled to demand the composition of a year's rent of the lands, 'on giving an entry to the defender,' and the Court adhered.

Pursuer's Authorities.—(1.)—Thomson, May 22, 1810, (F. C.); 2. Stair, 3, 14, & 4, 32; Salmon, July 25, 1751, (4181); Magistrates of Inverness, Feb. 2, 1769, (15059); Brisbane, June 6, 1794, (15061).—(2.)—Duke of Buccleuch, Aug. 5, 1768, (10711).

Defender's Authorities.—(1.)—D. of Roxburgh, Feb. 17, 1815, (F. C.)—(2.)—Earl of Cassilis, Feb. 3, 1796, (10756); Brown, Feb. 5, 1680, (11209); 2. Stair, 12, 27; 3. Ersk. 7, 37.

R. M'Kenzie, W. S.—Tait, Young, & Lawrie, W. S.—Agents.

Charles Ferrier, Petitioner.—*Forsyth.* No. 282.
J. Berry and Others, Respondents.—

Process.—The Court refused an application by Mr. Ferrier to grant commission to the Sheriff of Lanarkshire to take the depositions of witnesses, in an action of proving the tenor.

May 14, 1823.
Second Division.
F.

Jas. Swan, W. S.—M'Millan & Grant, W. S.—Agents.

E. Towart and Others, Petitioners.—*Neaves.* No. 283.

Judicial Factor.—Bilsland, a trustee under a trust-disposition and settlement for behoof of Mrs. E. Towart and others, having become utterly insolvent, and refusing to denude, Mrs. Towart, &c. applied to

May 14, 1823.
Second Division.
M'K.

the Court to declare Bilsland's right as Trustee extinguished by his insolvency,—to interdict him from intromitting with the trust-funds, and to appoint a judicial factor for the execution of the trust. The petition having been intimated, and no answers lodged, the Court, 'in respect of no answer,' granted its prayer.

Authority.—M'Dowall, Nov. 20, 1789, (7453).

T. KER, W. S.—Agent.

No. 284. DOWAGER LADY ANSTRUTHER, Suspender.—*A Murray.*

TUTORS of SIR J. ANSTRUTHER, Charger.—*Baird.*

May 14, 1823.

SECOND DIVISION. Lord Cringletie. M'K.

Fiar and Liferenter—Burden of Repairing Churches, &c.—By the entail of the estate of Anstruther, the heirs are empowered to infeft their wives or husbands in a liferent locality of the lands to a certain extent. In virtue of this entail, the late Sir John Anstruther executed a deed of locality in favour of his wife of certain lands which lay partly in three different parishes, in one of which a new manse had been built, and in all of which, the churches, manses, and school-houses, had required considerable repairs since the commencement of her liferent. The deed of locality contained no provisions as to the burden of building and repairing churches; but the tutors of Sir John Anstruther, the fiar, (a minor), claimed to be relieved by Lady Anstruther of the expence of these repairs, &c. in proportion to her locality lands. She suspended, and the Lord Ordinary reported the case on informations.

Lady Anstruther pleaded, that liferenters are only liable for burdens of an annual description, and that the act 1663, c. 21, imposed the burden both of building and repairing manses on the heritors, which term has been interpreted to mean fiars; and that the same rule ought, by analogy, to be applied to the case of churches and school-houses. The tutors, on the other hand, maintained, that, in equity, liferenters ought to bear a proportionate part of the burden, even of building and of making extraordinary repairs on churches, &c., but that they were at least liable for a proportion of the ordinary repairs, and for the interest of the sums expended by the fiar on building, and on extraordinary repairs during the period of their possession. The Court suspended the letters.

Suspender's Authorities.—1663, c. 21; 2. Bankt. 6, 30; 2. Ersk. 10, 57; Minister of Moreham, Nov. 14, 1679, (8499); Bruce, Jan. 23, 1773, (2333); Dundas, July 2, 1778, (8511); 43. Geo. III, c. 54.
Chargers' Authorities.—2. Bankt. 6, 28–30; 2. Ersk. 9, 60, & 10, 57.

H. G. Dickson, W. S.—J. Ker, W. S.—Agents.

A. Smith, Pursuer.—*Jameson.*
J. Matheson, Defender.—*Buchanan.*

No. 285.

May 14, 1823.

Second Division.
Lord Cringletie.
F.

Arrestment and Forthcoming.—In an action of forthcoming at the instance of Smith, a creditor of Mrs. Matheson, for £50, the arrestee, Matheson, denied that he had funds; but it appearing that he had, the day prior to the arrestment, granted to her a bill for £525, the Lord Ordinary decerned against him, and the Court refused to sist process till the issue of a multiplepoinding presently depending, in

which he alleged he would establish, that he had no funds in his hands at the date of the arrestment. The Court, however, ordained the arrestee to find caution to repeat, in the event of its being ultimately decided that there were no funds in Matheson's hands.

J. M'Donnell, W. S.—J. Pedie, W. S.—Agents.

No. 286. Misses Clarks, Pursuers.—*Jeffrey—Graham Bell.*
Thomson's Trustees, Defenders.—*Cockburn—Ivory.*

May 15, 1823.

First Division.
Lord Meadowbank.
H.

Homologation.—The late Mrs. Thomson executed a trust-disposition and settlement in favour of the defenders; and, after her death, the pursuers, her sisters, and heirs-at-law, brought a reduction of it on various grounds. The trustees pleaded in defence, homologation; but the Lord Ordinary repelled the plea, in respect, that 'the facts admitted and proved 'by the whole evidence in process, are not, of themselves, sufficient to infer homologation, to the effect 'of excluding the present action of reduction;' and the Court adhered.

Gibson & Oliphant, W. S.—W. Dallas, W. S.—Agents.

No. 287. J. Clugston, Advocator.—*More.*
J. Goold, Respondent.—*M'Farlan.*

May 15, 1823.

Second Division.
Bill-Chamber.
Lord Craigie.
F.

Landlord and Tenant—Reparation.—Clugston, tenant of a house and garden, pursued Goold, his landlord, before the Sheriff of Lanark, for damage alleged to have been sustained by him, in consequence of certain operations of the landlord, on premises in the

vicinity of the garden. The Sheriff, in respect, 'that 'the operations of the defenders were not complain- 'ed of at the time; and that the claim of damages 'now made, appears to be extravagant and unrea- 'sonable,' assoilzied Goold. Clugston presented a bill of advocation, which was refused by the Lord Ordinary, who, however, found no expences due. Both parties reclaimed, but the Court refused both petitions.

C. Fisher,—Tod & Wright, W. S.—Agents.

A. Allan and Others, Suspenders.—*Moncreiff*—*Skene.*
J. Smith and Others, Chargers.—*Baird.*

No. 288.

May 16, 1823.

First Division.
Lord Meadowbank.

Insurance—Warranty free of Average.—Smith and others effected insurance on the ship Earl of Fife, on a voyage at and from Banff to the Greenland seas, and till her return to Banff; and on the stores, to the amount of £2,000. The ship was valued, but the stores were not.—The stores were 'warranted free 'of average,' or, according to some of the policies, 'free of particular sea-average.' The premium of insurance on the vessel was three guineas, while that on the stores was two. The vessel sailed from Banff, but before she got out of the bay, was totally wrecked.—Part of the stores was entirely lost, and part was brought ashore in a very damaged state.—They consisted chiefly of fishing-lines, boats, and casks.—The lines were rubbed among the sand, so as to render them unfit for the Greenland fishery,—the boats were partially injured; and the greater number of the casks had their heads knocked in, or the staves

broken, and, in general, were so destroyed, as to be useless, except for being converted into smaller casks. The owners abandoned both the vessel and stores, and claimed as for a total loss against the underwriters. The latter, founding on the warranty, refused to pay for a total loss on the stores which had been saved. The stores were sold under judicial authority, and produced about 40 per cent. of the sum insured. An action was then brought against the underwriters before the Court of Admiralty, for the sum insured on the stores, in which the Judge decerned against them, in respect that the object of the voyage had been lost; 'that the stores on board of 'the vessel at the time were damaged, so as to bring 'much less than one-half of the sum insured upon 'them;—that, with the wreck of the vessel, the ob-'ject in view, with respect to the stores, was frus-'trated, and that they became unfit for another 'voyage of the kind.' In a suspension, the underwriters pleaded, that the effect of the warranty was to protect them against responsibility for any extent of damage, however great, and to render them liable only in the event of the stores being actually lost. The Lord Ordinary reported the case, and the Court, after ordering a condescendence by the owners, 'dis-'tinguishing the articles which were totally lost, 'from those which were saved, and only damaged,' suspended the letters simpliciter.

The Judges agreed with the opinions delivered by Lord Ellenborough and Justice Gibbs, in the cases quoted by the underwriters, that, by the warranty, they meant to guard themselves from every risk short of a total destruction of the subject of insurance.

Suspenders' Authorities.—Davy, 15. East, 559; Thomson, 16. East, 214; Hedberg Holt, 349; Park, 261, 186, Note, 623.
Chargers' Authorities.—Park, 159, 231; 1. Marshall, 14, 1; 1. Marsh. 6, 3, and Cases there; 1. Park, 182, and Cases there, 281, 228; Glennie, 2. Maule & Sel. 371.

D. MURRAY, W. S.—J. PEAT,—Agents.

J. M'LEOD, Pursuer.—*Ro. Thomson.*
J. C. THOMSON, Defender.—*L'Amy.*

No. 289.

May 16, 1823.

FIRST DIVISION.
Lords Gillies and Meadowbank.
D.

Expences.—After a reference to the oath of the defender, the Lord Ordinary assoilzied him with expences. The pursuer reclaimed, chiefly on the ground, that the defender's oath was inconsistent with a judicial declaration previously emitted; but the Court adhered.

Pursuer's Authority.—Smith, Feb. 23, 1701, (4084).

R. & T. HOTCHKIS & MEIKLEJOHN, W. S.—P. ORR, W. S.—Agents.

GEO. BOOTH and Others, Suspenders.—*Cuninghame—Fletcher.*
COMMERCIAL BANKING Co., Chargers.—*More.*

No. 290.

May 16, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

Cautioner in a Cash Credit.—Booth and others became obligants along with Charles Fyfe, in a bond granted to the Commercial Bank for a cash credit, to be kept in their books 'in the name of the said 'Charles Fyfe,' for the purpose of discounting bills, 'whereon the name of the said Charles Fyfe 'stands as drawer, acceptor, or indorser.' Fyfe accepted several bills under the signature of 'Charles Fyfe and Company,' a concern in which,

however, he had no partner. These bills were discounted by the Bank, and Fyfe having failed to retire them, the Bank charged Booth, &c. on their bond. They suspended, and pleaded, that they had interposed their credit in favour of Charles Fyfe, as an individual only, and not in favour of a Company, of which they knew nothing. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

Suspenders' Authorities.—Houston, March 4, 1820, (F. C.); 1. Bell, 263.

GREIG & PEDDIE, W. S.—J. A. CAMPBELL, W. S.—Agents.

No. 291. MARTHA DONALD, Pursuer.—*Jeffrey—J. W. Dickson.*

J. THOM, Defender.—*Cockburn—Pyper.*

May 16, 1823.

SECOND DIVISION. Lord Kinedder. M'K.

Reduction of Decrees of Commissaries—Marriage—Process.—Martha Donald pursued a declarator of marriage before the commissaries, against Thom, who was assoilzied in respect of the irrelevancy of Donald's condescendence. Thom also obtained decreet in his favour, in a counter-action of putting to silence. These decreets having been allowed to become final, an action of reduction was brought by Donald, within a year of the date of the decreet of putting to silence, but considerably beyond a year from the date of the decreet of absolvitor, in the action of declarator of marriage. Several additional averments were made by Donald, as to the facts she offered to establish, in proof of the alleged marriage. In defence, it was objected, 1. That the action was incompetent, because it ought to have been brought

within year and day of the decreet of absolvitor; 2. That the new averments were too late, as they must have been known from the commencement of the process. And, 3. That the facts averred were not relevant, as she merely alleged verbal promises, without a sufficient offer to prove concubitus; and that she had subsequently instituted an action of damages for breach of promise of marriage. The Lord Ordinary assoilzied Thom, and the Court adhered.

Pursuer's Authorities.—(1.)—Directions to Archbishops, 1609, c. 6; and 1666, Jan. 21.—(2.)—1. Bank. 5, 24; 1. Ersk. 6, 5; Anderson, Feb. 26, 1714, (12676); Inglis, March 3, 1786, (12689); M'Adam, March 8, 1807, (Ap. Proof, 4).

Defender's Authorities.—(1.)—Instructions to the Commissaries, Feb. 8, 1563, Art. 19 & 20; 1592, c. 25; 1606, c. 6; Balf. p. 276, &c.; 4. Bank. 13, 18; 1. Ersk. 5, 26.—(2.)—Cases in Dict. vol. ii, p. 209.—(3.)—Taylor, Feb. 16, 1786, (F. C.), as reversed in House of Lords; M'Lauchlan, Dec. 6, 1796, (12693); M'Gregor, Nov. 28, 1801, (12697).

M. Patison,—A. Howden, W. S.—Agents.

Mrs. M. Clark, (relict of the late James Hay), and Others, Pursuers.—*Moncreiff—Maconochie.* Trustees of the late John Hay, Defenders.—*Bell—Marshall.*

No. 292.

May 16, 1823.

Second Division. Lord Cringletie. M'K.

Implied Will—Provision to Children.—The late John Hay bound himself, in the contract of marriage of his eldest son James, to make certain provisions to the wife, and the children of the marriage. Some years thereafter, he executed a trust-deed in favour of the defenders, by which, after providing for the payment, 1. Of his debts; and, 2. Of certain special legacies to his younger children, he declared, that the free residue should be paid over to the family of his

son, James; and, by a subsequent codicil, he bequeathed £4,000 to the children of James, providing, 'that, 'in the event that there shall not exist a sufficiency 'of funds for payment of all the special legacies, in-'cluding that of £4,000 now given to the said James 'Hay and his family, that the said special legacies 'shall all suffer a proportional diminution.' At Mr. Hay's death, his funds were found inadequate to the full payment of all the legacies; and James Hay having died, his widow and children raised action against the trustees of John Hay, concluding for payment of the provisions in the contract of marriage, and also of the legacy of £4,000, with a deduction from the legacy proportionate to the shortcoming of funds. The trustees pleaded, in defence, 'debitor non pre-'sumitur donare;' and that, at all events, it was evidently the intention of Mr. Hay, to substitute the legacy for the provisions in the marriage-contract. The Lord Ordinary repelled the defences, and decerned against the trustees personally; and the Court adhered, recalling, however, the personal decerniture against the trustees.

Pursuers' Authorities.—Stair, i, 8, 2; and iv, 42, 21; Fraser, Feb. 13, 1677, (12859); Panton, March 1684, (12862); Cairns, Jan. 31, 1705, (12862); Lyon, Jan. 24, 1724, (12909); Stirling, June 20, 1704, (11442); Moncreiff, Feb. 23, 1775, (11455); Cruickshank, June 16, 1665, (11489); Winrahame, Dec. 15, 1668, (11489); Dickson, Dec. 5, 1671, (11490); Fenton, Jan. 23, 1673, (11491); Ord, Dec. 1685, (11492); Spadin, Jan. 14, 1819, (F. C.); Hardie, Jan. 17, 1821.

Defenders' Authorities.—3. Ersk. 3, 93; Davidson, June 25, 1706, (6966); Wauchope, Dec. 22, 1752, (4404); Belches, Dec. 22, 1752, (11361); Fleming, Nov. 19, 1661, (8260); Gallie, Dec. 18, 1782, (11374); Farquharsons, March 2, 1756, (6596).

D. & A. Thomsons, W. S.—Renton & Grant, W. S.—Agents.

J. HAMILTON, W. S. Pursuer.—*Cuninghame.*
W. GIBB, Defender.—*Solicitor-General Hope.*

No. 293.

May 16, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Writer's Hypothec.—Gibb was one of a number of co-trustees, under a disposition omnium bonorum, executed by one Martin for behoof of his creditors. The management of the trust was left chiefly to M'Donald, one of the trustees, who, in order to sell part of Martin's heritable property, obtained from Hamilton, W. S. the title-deeds, over which Hamilton had a right of hypothec for a business-account due him by Martin, and granted, in return, an obligation on behalf of himself and his co-trustees, 'to 'see Mr. Hamilton paid the just balance of his ac- 'counts out of the first and readiest of the means 'and estate of the said John Martin.' The property having been sold and conveyed to the purchaser, Hamilton raised action against M'Donald and Gibb for payment of his accounts. Gibb pleaded, in defence, that M'Donald had no authority from his co-trustees to get up the title-deeds, and that he had received no part of the price. To this it was answered, that he had acquiesced in M'Donald's management; that he had signed the articles of roup of the subjects, and the disposition to the purchaser, and discharged the price; and that the deeds in question were necessary, in order to sell the property. The Lord Ordinary repelled the defences, and the Court adhered.

J. HAMILTON, W. S.—J. STUART,—Agents.

No. 294.

G. SHEARER, Pursuer.—*Greenshields.*
Mrs. KNOX, Defender.—*Ro. Bell.*

May 17, 1823.

FIRST DIVISION.
Lord Alloway.
H

Process—Expences.—Shearer raised an action of accounting for rents against Mrs. Knox, who brought a counter-action. The Lord Ordinary, after conjoining the actions, and the report of an accountant, decerned against Shearer for a considerable sum. He represented, and stated objections to the report, but the Lord Ordinary adhered, reserving to him to give in a special condescendence. Another representation, accompanied by a condescendence, was refused, 'in respect the representer does not offer to 'pay the previous expences before the accountant;' and that 'the condescendence is not sufficiently ex-'plicit.' In none of these interlocutors were expences found due. On advising a petition by Shearer with answers, the Court adhered, and gave to Mrs. Knox the expence of the answers. She reclaimed, and prayed for full expences, maintaining, that her petition was competent, because the process was not exhausted, no decree of absolvitor from Shearer's action having been yet pronounced. The Court, holding, that, by the decree in her favour, she was truly assoilzied from that action, and that the whole case had been decided on the merits, refused the petition as incompetent.

Pursuer's Authorities.—Campbell and Co., May 21, 1803, (No. 3, Ap. Expences); Fleshers of Canongate, July 7, 1809, (F. C.); Wilson, Nov. 12, 1814, (F. C.); Bowie, Dec. 5, 1816, (F. C.); Donaldson, Feb. 16, 1821, (not yet rep.)

Defender's Authorities.—Goldie, Jan. 23, 1816, (F. C.); Wylie, Feb. 5, 1820, (F. C.)

J. USHER,—JOHNSTONE & LITTLE,—Agents.

J. Cook, Suspender.—*Sandford.*
J. Mill, Charger.—*Hutcheson.*

No. 295.

May 17, 1823.

First Division.
Bill-Chamber.
Lord Mackenzie.

Statute, 1. *Geo. IV, c.* 88—*Jurisdiction*—*Post-Horse Duties.*—Mill, the farmer of the post-horse duties in Scotland, presented an information under the statute 1. Geo. IV, c. 88, to the justices of peace of Edinburgh, against Cook, a licensed hackney coach master, charging him with having hired his coach and horses from the Tron Church to Arniston Place, and from thence to the Register House, a distance of about two miles, and with having neglected to insert in the weekly office account, the duty payable on that hiring. He concluded for a penalty of £20, and obtained a conviction for the mitigated sum of £5, from a justice of the peace. By the statute, it is enacted, that 'if any person or persons shall find 'himself, or themselves, aggrieved by the judgment or 'sentence of any such justice, then he, she, or they, 'shall, and may (upon giving security, &c.) appeal to 'the justices of the peace, at the next general quarter 'sessions for the county, &c. who are hereby em-'powered to summon and examine witnesses upon 'oath, and finally to hear and determine the same.' Instead of appealing to the quarter sessions, Cook presented a bill of suspension, which was objected to as incompetent, on various grounds. The Lord Ordinary reported the case, and the Court considering, that Cook ought, at all events, in the first place, to have appealed to the quarter sessions, refused the bill.

H.

It was observed from the Chair, that the words 'shall 'and may,' are imperative, and not merely permissive.

J. Taylor,—S. C. Sommerville, W. S.—Agents.

No. 296. R. Hutchison and Others, Complainers.—*Cranstoun—Skene.*

W. Tod and Others, Respondents.—*Jeffrey—Cockburn—R. Bell.*

May 17, 1823.

Second Division. F.

Proof—Process—Jury Court.—In an action for setting aside an election of the magistrates of Lanark, on the ground of an illegal combination, the Court made a remit to the Jury Court, to ascertain certain facts. The Jury Court, prior to trial, retransmitted the case for judgment, as to the competency of admitting evidence of the contents of a document (which had been destroyed), without a regular process of proving the tenor. The Court found, that there was no necessity for such a process; and being now satisfied of the expediency of taking the proof by commission, they recalled the remit to the Jury Court, and granted commission to the Sheriff of Lanark. Tod, &c. reclaimed, and contended, that the Court had no power under the 59. Geo. III, c. 35, § 3 and 12, to do any thing more on a retransmission of a process from the Jury Court, than to decide the question submitted to them, and again transmit it to that Court, and that they could not recal a remit once made. The Court, however, adhered.

Their Lordships were of opinion, that there was nothing in the act of parliament which obliged them to send the process back to the Jury Court;—that, by the retransmission, the remit was exhausted;—and that, therefore, there was even no necessity to recal it.

J. Swan, W. S.—W. Bell, W. S.—Agents.

G. BROWN and J. THOMSON, Suspenders.—*Henderson.*
J. GARDINER, Charger.—*Forsyth.*

No. 297.

May 20, 1823.

FIRST DIVISION. Bill-Chamber. Lord Balgray. D.

Landlord and Tenant.—Gardiner let a house or cottage to Mason, situated near a public road. During the currency of the tack, the road trustees, in virtue of a statute, altered the line of road, and trenched the old one. Their power to do so was under the condition 'of paying such damages to the owners and 'occupiers respectively, whose grounds or houses 'shall be prejudiced or damaged, by the making of 'such roads.' In a process of sequestration, Mason resisted payment of the rent, alleging that the house had been let as an inn,—that by the alteration on the line of road, he had suffered damage,—and that he was entitled to retain his rent in payment of it. The Sheriff-substitute allowed a proof of the damage which was taken; and found that it amounted to £3: 15s. But the Sheriff-depute, after the interlocutor allowing a proof was final, remitted to the substitute, in respect of the statute, to dismiss the claim of damages, and decern for the rent, which was done accordingly. Brown and Thomsons, cautioners for Mason, having been charged to pay the rent, presented a bill of suspension, on the ground, 1. That the tenant had a right, at common law, to retain the rent in payment of his damages, which could not be affected by the statute; and, 2. That the Sheriff-depute had no power to alter the final interlocutor, allowing a proof of damage, and which had fixed that such a claim existed. The Lord Ordinary refused the bill, and the Court adhered.

AINSLIE & MACALLAN, W. S.—D. FISHER,—Agents.

No. 298. D. STEWART, Pursuer.—*Keay.*
W. WILSON and A. THOMSON, Defenders.—*More—A. Lothian.*

May 20, 1823.
FIRST DIVISION.
Lord Alloway.
D.

Executor.—The defenders and Captain Campbell were appointed executors of the late J. Wilson. In the course of the administration of their duty, Stewart had been employed as their law-agent; and, in particular, by Captain Campbell. Having brought an action against them for payment of his account, they objected to it, so far as regarded the employment by Captain Campbell, which, they alleged, was contrary to their orders. But the Lord Ordinary decerned against them, in respect 'that the expences 'objected to seem to have been necessary in the 'discharge of Captain Campbell's duty of executor, 'and to relieve himself of responsibility;' and the Court adhered.

D. STEWART,—G. WILSON,—Agents.

No. 299. J. THOMSON, Pursuer.—*Christison.*
J. M'TAGGART, Defender.—*A. Bell.*

May 20, 1823.
FIRST DIVISION.
Lord Meadowbank.
D.

Principal and Agent—Election Expences.—M'Taggart having offered himself as a candidate to represent in Parliament the district of burghs, of which Stirling is one, and employed two agents to canvass for him, they contracted tavern-bills to a large amount. For payment of these an action was brought against M'Taggart and his agents. M'Taggart admitted that he had employed these agents, but denied that he had authorized them to incur the

expences sued for; and maintained, that he was only liable subsidiarie. But the Lord Ordinary decerned against him, in respect 'that where one proposes 'himself as a candidate to represent a royal burgh 'in Parliament, and employs accredited agents to 'conduct his canvass of the electors thereof, ostensi-'bly without limitation or controul, he is responsi-'ble for all lawful debts contracted by them in the 'course of the proceedings relative to the election 'and the canvass of the said burgh.'—'That in the 'course of the canvass so conducted, the debts sued 'for were contracted in the name and for the be-'hoof of the said defender; and that there is no-'thing in the nature of the said debts which can 'prevent their being recovered by proceedings at 'law.' The Court adhered.

W. Renny, W. S.—V. Hathorn, W. S.—Agents.

J. Vans Agnew, Petitioner.—*Jeffrey—Robertson.* No. 300.
Earl of Stair and Others, Respondents.—*Cranstoun—Thomson—A. Bell.*

May 20, 1823.
Second Division M'K.

Application of Judgment of House of Lords.—The Earl of Stair and others having availed themselves of the opportunity afforded by the decision of the Court, (see ante, Vol. II, No. 63), and applied to the House of Lords to be reheard, their petition was refused; but, in respect of special circumstances, a part of the judgment relative to bygone rents was expunged, and a remit made to hear parties thereon. The Court, on the petition of Mr. Agnew, applied the judgment as modified, and remitted to the Lord Ordinary to proceed accordingly.

J. Forman, W. S.—J. Bell, W. S.—Agents.

No. 301. J. GRAHAMS, Senior and Junior, Suspenders.—*Tawse.*
Dr. J. GRAHAM, Charger.—*Blackwell.*

May 20, 1823.
SECOND DIVISION.
Lord Cringletie.
B.

Dr. John Graham charged James Grahams, senior and junior, (his father and brother), to make payment of the amount of a bill granted by them, as the balance of accounts due by them.—They suspended to the extent of £40, on the ground that Dr. Graham, thirteen years before, had drawn a bill for that amount on his father, which had been retired by money lent to his father by his brother, James Graham, junior. The Court being satisfied that that bill had been settled, adhered to the Lord Ordinary's interlocutor finding the letters orderly proceeded.

JNO. BLAIR, W. S.—A. ALLAN, W. S.—Agents.

No. 302. J. AITKEN, Suspender.—*Ivory.*
A. THOMSON and Others, Chargers.—

May 20, 1823.
SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
M'K.

Process—Expences—Bill-Chamber.—Aitken presented a bill of suspension, which the Lord Ordinary refused, with expences. A second bill, on the same grounds, was presented and passed. Aitken then petitioned against the interlocutor refusing the first bill, in order to keep the question open as to the expences. The Court, 'to keep the question entire,' remitted to pass the bill.

RAMSAY & IMRIE,—J. MARSHALL,—Agents.

J. BARR, Pursuer.—*P. Robertson.*
M'ILWHAM'S TRUSTEES, Defenders.—*Cuninghame.*

No. 303.

May 22, 1823.

FIRST DIVISION.
Lord Alloway.
S.

The case, No. 158, Vol. I, having returned to the Lord Ordinary to apply the judgment of the Court, his Lordship repelled a claim by the defenders, in respect it had been refused by the Court. The defenders reclaimed, alleging that it had not been decided; but the Court adhered.

J. R. STODART, W. S.—JA. SMYTH, W. S.—Agents.

H. SALMON, Trustee for the Creditors of J. and A. TODD and COMPANY, Petitioner.—*Hunter.*
TRUSTEES of the late A. TODD.—*Cuninghame,*—and J. PADON, Respondents.—*D. Macfarlane.*

No. 304.

May 22, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord Hermand.
D.

Bankrupt—Sequestration—Inspection of Books.—On the 1st of January 1809, a company was formed under the firm of J. and A. Todd and Company. It was dissolved by the death of a partner in December 1815, and its affairs completely wound up both with the public and the partners. In January 1816, a second company, under the same firm, was entered into, which continued till October 1820, when a partner publicly withdrew, and the business was closed as on the former occasion. A third company, consisting of James and Andrew Todd, trading under the old firm, was then formed, which became bankrupt, and was sequestrated. On the estate of this company Salmon was appointed trustee. James Todd and the respondent, Padon, had been partners of the first and second concerns, and Andrew of the second. The late A.

Todd was a partner of the first only. By the contracts of the first and second companies it was agreed, that an annual balance should be struck and doquetted, which should be probative against all concerned. This was accordingly done.

Salmon presented a petition to the Lord Ordinary on the Bills, praying him to ordain the respondents to deliver up the books of the two first companies. This they resisted; but offered inspection under the controul of a commissioner, so far as the trustee could shew an interest. The Lord Ordinary allowed an inspection, 'so far as the bankrupts shall appear to 'have an interest in them,' and remitted to a commissioner to give excerpts to the trustee, 'so far as 'he can shew such interest.' The trustee then applied to the Court, praying for a general inspection of the books from January 1809, when James Todd became a bankrupt; but the Court adhered.

Petitioner's Authorities.—54. Geo. III, c. 137, § 17, 26, 29; 2. Bell, 479, and Case there, 483, 484, 496.

Respondents' Authorities.—Bower, May 26, 1810, (F. C.); Douglas, Heron, and Co., June 16, 1792; Carse, Dec. 10, 1802, (Ap. No. 2, Herit. & Mov.)

W. ALEXANDER, W. S.—R. COWAN, W. S.—GREIG & PEDDIE, W. S.—Agents.

No. 305. C. and J. PHILLIPS and Others, Suspenders.—*Blackwell.*

WILLIAM JEFFREY, Trustee on WEIR's Sequestrated Estate, Charger.—*Shaw.*

May 22, 1823.

SECOND DIVISION. Bill-Chamber. Lord Craigie. B.

Expenses.—The Lord Ordinary, in refusing a bill of suspension presented by Phillips, &c. of a warrant of sale granted by the magistrates of Glasgow, of

certain goods which formed the fund in medio in a multiplepoinding, did not find expences due to the chargers. They petitioned, and the Court allowed expences.

J. B. BRODIE,—G. M'DOWALL,—Agents.

JAMES HAIG, Pursuer.—*Buchanan.*
Mrs. FORBES and Others, Defenders.—*Baird.*

No. 306.

May 22, 1823.

SECOND DIVISION.
Lord Pitmilly.
F.

Superior and Vassal—Non-entry—Expences.—The case, ante, Vol. I, No. 8, having been remitted to the Lord Ordinary to determine as to expences, his Lordship found the pursuer 'entitled to the expences 'incurred in the question agitated between him and 'Dr. Moodie, to be paid out of the rents of the lands 'falling due after the date of citation;' and Mrs. Forbes, &c. entitled to the expences incurred subsequent to the date of the first interlocutor, after their appearance in the action. Mrs. Forbes, &c. reclaimed against the decerniture in favour of Haig; but the Court adhered.

GIBSON, CHRISTIE, & WARDLAW, W. S.—GEO. WILSON,—Agents.

Mrs. HAMILTON and Others, Pursuers.—*Cranstoun—More.*
W. ROGER, Trustee on the Sequestrated Estate of W. and J. CARSEWELL, Defender.—*Jardine.*

No. 307.

May 22, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Bond of Annuity—Real Burden.—In 1811, W. and J. Carsewell, merchants, in consideration of £2,000 paid them by Mrs. Hamilton, granted an irredeemable bond of annuity, by which they bound themselves,

'their heirs and executors, and the concern of W. and J. Carsewell, and the trade, stock, and estate 'thereof,' to pay a yearly annuity of £260 to Mrs. Hamilton during her life; and, after her death, an annuity of £100 yearly, to each of her two sons during their respective lives. Besides a personal obligation, they, in further security of payment of the annuities, disponed to Mrs. Hamilton and her sons, certain heritable subjects, and, in the event of two terms remaining unpaid, 'irredeemably, to the end, that they 'may sell, as they are hereby empowered in the event 'aforesaid, without any declarator or order of law, 'and without the consent of us, &c. to sell and dis-'pose of the said subjects, the price to be applied 'in payment of the purchase-money, or expence of 'procuring a similar annuity,' &c. and the surplus, if any, to be paid to Carsewells. The annuity was paid to Mrs. Hamilton, till 1820, when Carsewells became bankrupt and were sequestrated. As the principal sum of £2,000 could not at that time purchase an equivalent annuity, Mrs. Hamilton, &c. insisted, that in the event of the trustee on the Carsewells' estate selling the heritable subjects: it should only be under burden of the annuity, or that they should be entitled to receive out of the price such a sum, (although exceeding £2,000), as would purchase a similar annuity. The trustee, on the other hand, contended that he was entitled to sell the subjects and relieve them of the annuity, by merely paying up the original purchase-money. An action having been brought to have this point decided, the Lord Ordinary found 'that all that the pur-'suers can demand, in virtue of their bond and pre-'ferable security, is payment of the arrears of the

'annuity, and repayment out of the price of the 'subjects of the principal sum of £2,000.' But the Court altered, and found that the pursuers 'are 'not bound to receive repayment of the sum of '£2,000 together with payment of the arrears of the 'annuity, as full implement of the obligations con-'tained in the bond of annuity, but are entitled to 'insist that the several annuities thereby stipulated 'to be paid shall remain burdens on the properties; 'but that they are not entitled to insist for a right 'to sell the subject in terms of the conclusions of the 'libel; and remit to the Lord Ordinary to proceed 'accordingly.'

G. DUNLOP, W. S.—W. & A. G. ELLIS, W. S.—Agents.

No. 308.

LORD DUNDAS, Suspender.—*Jardine.*
R. WIGHT, Trustee for the Creditors of the Rev. Dr. MOODIE, Charger.—*M'Neill.*

May 23, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Retention.—By a disposition granted in a process of cessio, Dr. Moodie assigned to Wight, as trustee for his creditors, one-half of his stipend, reserving the respective rights of the creditors. Lord Dundas, being both an heritor and creditor, claimed retention of his debt out of that part of the stipend payable by him. To this it was objected, that the half reserved to Dr. Moodie was alimentary, and could not be retained; and that the other half being a fund which, although paid through the hands of the heritor, belonged ex lege to the minister, who had assigned it to the trustee for his creditors, was not capable of retention; and that Lord Dundas was a party to the process of cessio, and had ranked under the assignation. In a suspension, the Lord Ordinary found,

that 'Lord Dundas is not entitled to retain any part 'of the alimentary half, but that his right of reten- 'tion must be confined to the other half thereof 'payable by him;' and the Court refused a petition by the trustee, without an answer.

J. KERR, W. S.—A. GOLDIE, W. S.—Agents.

No. 309.

J. BARBOUR, Pursuer.—*More.*
MRS. NEWALL, Defender.—*Cockburn—Maitland.*

May 23, 1823.

FIRST DIVISION. Lord Meadowbank. S.

Bill of Exchange—Protest.—Barbour raised action against Mrs. Newall, as representing her husband, on three bills, of which he was drawer and indorser, and which fell due in 1811. In evidence of the protest of the bills, an instrument, dated in 1811, including several others, was produced. The inferior court and the Lord Ordinary held, that the bills had not been protested in terms of law, and assoilzied. Barbour reclaimed, and produced to the Court separate instruments, recently framed, applicable to each of the bills. A remit was then made to the Lord Ordinary to hear parties in the case as it now stood. To these instruments, it was objected, 1. That after the judicial production of the original instrument, they could not be received. 2. That they could not afford legal evidence, because they were not extended from authentic materials, the noting not having been made on the bills themselves, on which alone such a marking could be made; and that, even were it competent to refer to the original instrument, it could bear no faith, as it was there stated that one of the bills had been protested on a Sunday: and, 3. That it was illegal, at the distance of twelve

years, to extend an instrument of protest. The Court, on the report of the Lord Ordinary, held, that although an instrument of protest might be extended at any distance of time, provided it was done from authentic evidence, yet there was here no such evidence, and, therefore, assoilzied.

Pursuer's Authorities.—Brown, Dec. 8, 1807, (Ap. No. 21, Bill of Ex.); 6. Term. Rep. 175; Buller, Nisi P.; 4. Esp. 48; Bayley, 217.
Defender's Authorities.—1. Bell, 338; 2. Bell, 260.

W. DALRYMPLE,—T. GRIERSON, W. S.—Agents.

J. AITCHESON, Suspender.—*Shaw.*
J. M'DONALD, Charger.—*H. J. Robertson.*

No. 310.

May 23, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord Mackenzie.
D.

Process—Reference to Oath.—Aitcheson presented a bill of suspension of a charge on a bill, alleging that M'Donald, the charger, was not a bona fide onerous indorsee. The Lord Ordinary refused the bill on the 1st of May. A second bill was presented on the 12th of May, containing a reference to oath. This bill was objected to as incompetent, on the ground, that as the first bill had been refused within the three last weeks of the vacation, Aitcheson ought to have reclaimed to the Court. The Lord Ordinary refused 'the bill as incompetent.' Aitcheson then presented a petition to the Court, and again made a reference to oath. This petition was likewise objected to as incompetent. But their Lordships, holding that it was competent to refer to oath at any time while the case was in Court, remitted to the Lord Ordinary to receive the reference.

CAMPBELL & BURNSIDE, W. S.—M. N. MACDONALD, W. S.—Agents.

No. 311. G. HEPBURN, Suspender.—*Skene—Whigham.*
J. COWAN, Charger.—*Moncreiff—Ivory—J. Henderson, Junior.*

May 23, 1823.
FIRST DIVISION. Lords Gillies and Meadowbank.
H.

Compensation.—This was a question of compensation, which resolved into the nature of an accounting. The Lord Ordinary and the Court sustained the compensation to the extent pleaded, and the Court adhered.

T. SYME,—J. MALCOLM,—Agents.

No. 312. D. CUTHBERTSON, Pursuer.—*Forsyth.*
J. LYON, Defender.—*Bell—Buchanan—Shaw.*

May 23, 1823.
FIRST DIVISION. Lord Alloway.
D.

Septennial Prescription—Cautioners in a Composition Bond.—D. M'Funn and Company having become bankrupt, and their estates having been sequestrated, they settled with their Creditors, by a composition, in terms of the statute. A bond for payment of this composition, payable by two instalments, at six and twelve months from the date of approval by the Court, and of the expences of the sequestration, was granted by them and Lyon. In this bond, Lyon was bound expressly as cautioner, with a clause of relief. It was approved of by the Court, and the sequestration discharged on the 11th of July 1811. On this bond an action was raised by Cuthbertson against Lyon, for payment of the composition, on the 11th of October 1820. He pleaded in defence the septennial limitation, under the statute 1695, c. 5. The Lord Ordinary repelled this defence, 'in respect 'that the caution found for payment of the compo-

'sition under the bankrupt statute, must be held as 'a judicial caution for payment of the composition 'upon the whole debts, indefinitely due by the 'bankrupts, whenever the amount of these debts, 'which had been contracted previous to the bankruptcy, shall be ascertained,' and the Court adhered.

Pursuer's Authorities.—Blair, Jan. 20, 1747, (11025); 1. Bell, 272; 3. Ersk. 7, 23, and Cases there; Spence, Feb. 3, 1742, (Elch. No. 12, Caut. and 11020); Gordon, Nov. 18, 1748, (11025).

Defender's Authorities.—2. Bell, 347; Balvaird, Jan. 18, 1709, (11005); Borthwick, Feb. 4, 1713, (11008); Hope, Feb. 4, 1715, (2152); Millare, Feb. 19, 1762, (11027); 3. Ersk. 7, 23; Strong, Jan. 5, 1707, (11005); Stewart, July 27, 1726, (11010); M'Rankin, Feb. 24, 1714, (11034); Robertson, Dec. 3, 1736, (Elch. No. 6, Caut.); Sir R. Munro, July 22, 1741, (11017); 3. Ersk. 7, 23; Anderson, May 25, 1821, (ante, Vol. 1, No. 36).

D. Fisher,—J. Russel, W. S.—Agents.

No. 313.

A. Mackenzie, Pursuer.—*Jeffrey—Fullarton.*
Capt. C. Mackenzie and Others, Defenders.—*Cranstoun—Murray.*

May 23, 1823.

First Division.
Lord Meadowbank.
D.

Entail.—The late Colin Mackenzie executed a disposition and deed of settlement, in favour of Trustees, inter alia, to purchase an estate, to be entailed in the mode there prescribed. The trustees bought the estate of Newhall, of which they executed an entail. By the prohibitive clause, the heirs were forbidden 'to sell, dispone, wadset, or impignorate the 'lands and others before disponed, or any part there-'of, *or to contract debt thereon*, or grant infeftments 'of annual-rent, or liferent, furth of the same, or any 'other right or security, redeemable or irredeemable, 'of the lands and others before disponed,' &c. 'nor to

'do any other act or deed, civil or criminal, or even 'treasonable, for which the said lands, &c. may be 'any way adjudged, evicted, or confiscated;' and it was declared, that if any adjudication or other legal diligence were led against the estate for public burdens, the debts of the entailer, 'or for any other 'debts whatsoever, which may, consistently with the 'laws of Scotland, and limitations of the said trust 'and settlement,' &c. 'affect or be made real bur-'dens on the said lands,' then the respective heirs were to purge them within a limited period. By the irritant clause, it was declared, that if any of the heirs 'shall act or do in the contrary of the par-'ticulars before specified, &c. all such acts and deeds, 'whether by altering the order of succession, selling, 'disponing, contracting debt, or otherwise, &c. shall 'be ipso facto, void and null,' and the resolutive clause was in the ordinary form.

Donald Mackenzie, the heir of entail in possession, contracted a debt of £6,000, and granted his bill for the amount, to which the pursuer having acquired right, he raised an action of declarator, to have it found, that he was entitled to adjudge the estate. The ground on which he rested was, that the entail did not prohibit the contracting of debt, but only the contracting of debt *on the estate*; and that, therefore, it was competent, by the use of legal diligence, to attach it. To this it was answered, that an entail has always the estate in view,—that the entailer cannot prohibit the heirs from contracting debt; but only from contracting it so as to affect the estate, and that the prohibitory clause was sufficient for that purpose. The Lord Ordinary found, that 'the 'deed of entail libelled is sufficient to protect the

'estate against being affected, burdened, or adjudg-'ed by the debts in question,' and the Court adhered.

Pursuer's Authorities.—1685, c. 22; Sinclair, Nov. 8, 1749, (15382); Bruce, Jan. 15, 1799, (15539); Smollet's Creditors, May 14, 1807, (Ap. No. 12, Tallzie).

Respondent's Authorities.—Dallas, 553, 861; L. Strathnaver, Feb. 2, 1728, (15373); Henderson, Nov. 12, 1796, (15442); Scott, July 18, 1722, (3673); 3. Ersk. 8, 30.

W. Mackenzie, W. S.—Gibson, Christie, & Wardlaw, W. S. —Agents.

R. Stevenson, Suspender.—*Fergusson.*
J. Robertson, Charger.—*D. M'Farlane—Borthwick.*

No. 314.

May 23, 1823.

Second Division. Lord Pitmilly. F.

Expences.—Robertson having, in 1811, charged Stevenson on his acceptance, Stevenson presented a bill of suspension, which was passed, and a protestation having been put up by Robertson, the bill was produced to the keeper of the minute-book, and the protestation scored out. No farther steps were taken till 1821, when Robertson charged of new. Stevenson then suspended on the ground of the previous suspension being still in dependence. After a long search by several diligences, the process was found in the repositories of Stevenson's former agent, who had been dead for several years. The Lord Ordinary suspended the letters; but considering, that it was impossible that Robertson could have known whether the former suspension was or was not a depending process, without production of the original bill, and, as that had been found in the repositories of the

agent of Stevenson, he found him liable to Robertson in expences, and the Court adhered.

Jas. Gemmel, W. S.—Greig & Peddie, W. S.—Agents.

No. 315. J. Russel and Others, (Harrieman's Trustees), Pursuers.—*Bell—M'Neill.*
Jas. Turner, Defender.—*Baird.*

May 23, 1823.
Second Division.
Lord Cringletie.
F.

In this case no general point was decided. It was an action against Turner, as partner in a joint concern with another individual, to whom Harrieman had made furnishings, and resolved into a count and reckoning. But the Court, on the report of the Lord Ordinary, being satisfied that several sums charged against Turner which exceeded the balance sued for, had not been advanced to the concern, assoilzied him.

Ro. M'Kenzie, W. S.—Jas. Stewart,—Agents.

No. 316. A. Cooper, Pursuer.—*Jeffrey—Currie.*
Mrs. Campbell and Others, Defenders.—*Solicitor-General Hope—M'Neill.*

May 23, 1823.
Second Division.
Lord Cringletie.
F.

Reparation—Process—Bill-Chamber.—Mrs. Campbell and her children having charged Cooper for payment of a sum found due to them by a decreet-arbitral, he presented a bill of suspension, which was passed as to £10, and interest thereon, but refused as to the greater amount of the sum charged for, and Campbells obtained a certificate of the refusal of the bill to that extent. Cooper, without obtaining a sist, boxed a petition against the interlocutor of refusal,

notwithstanding which, Campbells proceeded with their diligence, and arrested Cooper in his own house, on a caption, from which he was relieved on giving a bill for the amount, under deduction of the £10. In the meantime, Campbells had also used arrestments of the rents in the hands of Cooper's tenants, and Cooper had presented a bill of loosing arrestments, and consigned the sum charged for, in the hands of the clerk of the bill-chamber, of which he offered to prove that Campbells and their agent were in knowledge, when they executed the caption. On these grounds he raised an action of damages against the Campbells, and Hamilton, their agent. The Lord Ordinary and the Court, holding the execution of the diligence to be perfectly legal, and that although it was, perhaps, unnecessary, yet, as the circumstances were not so nimious and oppressive as to warrant an action of damages, assoilzied the defenders.

Defenders' Authority.—A. S. June 14, 1799.

A. GOLDIE, W. S.—J. BOWIE, W. S.—Agents.

Mrs. BRYAN, Suspender.—*Pyper.*
W. NOBLE and Others, Chargers.—*Ferguson.*

No. 317.

May 24, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord Mackenzie.
S.

This was a question as to the passing of a bill of suspension without caution. The Lord Ordinary passed it on caution; but the Court remitted to pass it simpliciter.

J. P. GRANT, W. S.—J. GEMMEL,—Agents.

No. 318. J. and A. SMITH, Suspenders.—*Maidment.*
J. STEWART, Charger.—

May 24, 1823.

SECOND DIVISION. Bill-Chamber. Lord Cringletie. B.

The Lord Ordinary refused a bill of suspension of a decree and charge of removing, presented by Smiths, 'in respect that the decree charged on, and 'charge given, is not that the complainers shall re-'move, but that Mrs. Janet Wilkie, *alias* Smith, 'shall remove, who does not complain of the charge,' the Court adhered.

H. WHARTON,— ,—Agents.

No. 319. J. FLEMING, Suspender.—*Shaw.*
J. WILSON, Charger.—*Jeffrey—Handyside.*

May 24, 1823.

SECOND DIVISION. Bill-Chamber. Lord Mackenzie. B.

Cautioner in a Bond.—William and James Wilson as principals, and Fleming as cautioner, granted to John Wilson a bond for £280, bearing to be payable at Martinmas 1820, and disponing certain heritable subjects in security. W. and James Wilson having become bankrupt in 1822, John charged Fleming on his cautionary obligation. Fleming presented a bill of suspension, on the grounds, 1. That Wilson had given the principal debtors time, by allowing two years to elapse after the term of payment of the bond, without demanding payment; and, 2. That he had become party to a composition contract between the debtors and their creditors, without Fleming's consent; whereby the personal obligation in the bond had been discharged, and the cautioner accordingly freed. The Lord Ordinary refused the bill. Fleming reclaimed, and the Court having refused the petition, quoad the

first point, without answers, and being satisfied as to the second, that no composition had been accepted for the debt in question; and, besides, that Fleming had been preses of a meeting of the Wilsons creditors, who unanimously recommended all the other creditors to accept of the composition, adhered to the Lord Ordinary's interlocutor.

Suspender's Authorities.—(1.)—Paisley, Jan. 13, 1799, (8228); Un. of Glasgow, Nov. 18, 1790, Bell's Cases, p. 134; M'Laggan and Co. Nov. 19, 1813, (F. C.); Executors of Houstoun, March 4, 1820, (F. C.); Fell on Guarantee, p. 91; Nisbet v. Smith, 2. Brown, 578; Rees v. Berrington, 2. Vesey, jr. 542.—(2.)—Mitchell, June 4, 1822, (ante, Vol. I, No. 545); 1. Bell, 275; Whitelaw, May 20, 1814, (F. C.); Fell, 145; Smith, 3. Brown, 1.

G. M'Dowall,—Carnegy & Shepherd, W. S.—Agents.

R. White and Others, Petitioners.—*Skene.*

No. 320.

May 27, 1823.

First Division
Lord Meadowbank.
H.

Common Agent—Ranking and Sale.—In a process of ranking and sale of the estates of Mr. Sibbald, who was resident abroad, the Lord Ordinary appointed the 31st of March 1823 for the election of a common agent. On the 24th, an extrajudicial meeting of the creditors was held, at which it was resolved to accede to a private trust, to be executed by Mr. Sibbald, and, in the meanwhile, to keep the process awake. The agents in the ranking attended this meeting, and were instructed to communicate the minutes to the clerk of process. When the day appointed by the Lord Ordinary arrived, they, accordingly, did so; but the clerk considering it to be the safest course to obey the order of Court, and that prejudice might otherwise possibly arise, required a common agent to be elected, leaving all objections

to be stated to the Lord Ordinary. One of the agents was nominated, and, on hearing parties, the Lord Ordinary confirmed him as common agent. But the Court, on a petition, recalled the appointment, and remitted to the Lord Ordinary to proceed accordingly.

D. THOMSON, Jun. W. S.—Agent.

No. 321.

J. M'NAUGHT, Pursuer.—*Maitland.*
J. NAPIER, Respondent.—*Christison.*

May 27, 1823.
FIRST DIVISION.
H.

Cessio.—The Court, of consent, granted decree of cessio in favour of the pursuer, which they had formerly refused, see Vol. II, No. 197.

A. BLAIR, W. S.—W. RENNY, W. S.—Agents.

No. 322.

J. LOGAN, Pursuer.—*Maitland.*
A. BUCK, Defender.—*J. Henderson, Junior.*

May 27, 1823.
FIRST DIVISION.
Lord Alloway.
H.

This was an action of repetition, which resolved into a question of accounting. The Lord Ordinary found, that certain sums had been received by the defender, which shewed that he had been overpaid; and the Court adhered.

J. ADAMS,—J. HERIOT, W. S.—Agents.

C. MACINTOSH, Suspender.—*Fullerton.*
E. MACKINLAY, Charger.—*Cockburn.*

No. 323.

May 27, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord Alloway.
H.

Judicial Examination—Process.—Mackinlay, a maid-servant, brought an action before the Sheriff-court against Macintosh, for wages and board-wages, alleging that she had been illegally dismissed from his service. His defence was, that she had delayed for some days to enter to her service, at the stipulated term, and that she had sent an excuse, which was false. The Sheriff having decerned in terms of the libel, Macintosh appealed to the Circuit Court. A remit was made to the Sheriff, to allow Macintosh 'a proof of the allegations contained in his answers 'to the original petition,' reserving the question of expences, except those of extract, for which decree was pronounced against Mackinlay. After the Sheriff had allowed a proof, Macintosh prayed for a judicial examination of Mackinlay. This the Sheriff refused, in respect of the terms of the remit, and Macintosh having failed to bring proof, decree was again pronounced against him, and for the expences at the Circuit Court, including those of extract. Macintosh then presented a bill of suspension, on the ground, 1. That a judicial examination being a mode of proof, fell within the terms of the remit; and, 2. That the Sheriff had no power to decern for the expences of the appeal, and, particularly, for those of extract, for which decree had been given in his favour. The Lord Ordinary and the Court refused the bill.

The Court, without entering on the competency in general, of a judicial examination, considered, that, at all events, the demand for it came too late.

M'MILLAN & GRANT,—J. MACDONNELL, W. S.—Agents.

No. 324. J. MYLES, Advocator.—*Skene—J. Henderson, Junior.*
ISABELLA SKINNER, Respondent.—*Baird.*

May 27, 1823.
SECOND DIVISION.
Lord Cringletie.
F.

Sale.—Myles pursued Skinner before the Sheriff of Fifeshire, for payment of certain goods, ordered and received by her from him, and which were sent out by her to her brother in America. It was pleaded, in defence, that the order for the goods was given by Skinner expressly for her brother; and, that Myles trusted entirely to the brother's credit. The Sheriff, on advising a proof, assoilzied Skinner. But, in an advocation, the Lord Ordinary and the Court decerned against her.

G. TOD, Junior,—R. THOMSON,—Agents.

No. 325. J. WHITELAW, Pursuer.—*Matheson.*
C. TURNBULL & Co., Defenders.—*Jameson.*

May 28, 1823.
FIRST DIVISION.
Lord Meadowbank.
S.

Expences.—This was a question of expences, arising out of an action of count and reckoning. The Lord Ordinary found them due to the defenders, subject to modification; and the Court, on a petition by the pursuer, adhered.

J. MACDONNELL, W. S.—CARNEGY & SHEPHERD, W. S.—Agents.

A. CAMPBELL, Pursuer.—*Cranstoun—Moncreiff—Fullerton—Walker.*
W. DUNN and Others, Defenders.—*Jeffrey—Blackwell—Skene.*

No. 326.

May 28, 1823.

FIRST DIVISION. Lord Meadowbank. H.

Conditional Contract—Clause—Personal and Real.—By the entail of Blythswood, alienations are prohibited, but power is given, by an act of Parliament to trustees, to feu out part of the estate. A feu-contract was entered into by the trustees, with W. Harley, by which they conveyed to him a portion of the estate, under the conditions that he should not subfeu;—that all dispositions and infeftments granted by him should be held directly of the trustees:—that they should be presented within twelve months for confirmation, and contain a clause specifying the precise amount of the feu-duty calculated according to the reductions of its gross amount, which it might receive by successive divisions of the property; and 'declaring also, that the said disposition or other 'conveyances of the whole, or of parts and portions 'of the said lands, with the infeftments to follow 'thereon, shall be made out and extended by the 'agent of the said trustees, or their foresaids, for 'the time being, and that at the proper charges of 'the disponers of the said lands, or of the said dis-'ponees, or their foresaids, otherwise the same shall 'be void and null.' To this was subjoined a general clause of irritancy, in the event of these conditions not being observed. Harley having become insolvent, disponed the property to trustees, who were infeft. They feued a part of it for payment of the feu-duty, and of a price, to Dunn and others, who also took in-

feftment. These deeds were not written by the agent for Blythswood's trustees, and when Dunn and others presented their disposition and sasine for confirmation, it was refused by Mr. Campbell, the superior and heir of entail in possession. A claim of damages having been threatened, Mr. Campbell brought an action of reduction of the disposition and sasine, on the ground, that they had, 'in violation of the sti-'pulations above inserted, and which are contained 'in the infeftments following upon the said feu-con-'tract, been made out and extended by agents dif-'ferent from the agent of the said trustees.' In defence, against this action, it was pleaded,—1. That Mr. Campbell had no interest to reduce, because Harley's title would still subsist, and the latter was under a personal obligation to dispone, so that no prejudice could be qualified from the deeds not being written by his agent. 2. That the clause was contra utilitatem publicam, because it prevented purchasers from employing their own agents, and subjected them to the caprice and exorbitant demands of the one appointed by the superior. 3. That it was contrary to the 20. Geo. II, c. 20, by imposing an undue restraint in alienating without the superior's consent. 4. That it was not a real burden; and, therefore, was ineffectual against purchasers: And, 5. That as the vassal's right was not irritated, that of a disponee could not be affected by the irritancy. The Lord Ordinary reduced and decerned in terms of the libel; and the Court adhered.

The majority of their Lordships held that Campbell had an interest in the clause to protect the rights created in his favour; that the original feu-contract

was qualified by the condition, that all conveyances should be made out by the agent of the superior; and that this being a conditional contract, was effectual against all third parties taking benefit from it.

Pursuer's Authorities.—(2.)—Sir R. Preston, March 6, 1805, (No. 2, Ap. Real and Pers.); 1. Bell, 30, Note; 1. Bell, 27.

Defenders' Authorities.—(1.)—Kames' Elucid. 214; Kerr, Feb. 10, 1630, (3779); Shaw, March 8, 1759, (7845).—(2.)—Stewart, Nov. 12, 1794, (15027); Mag. of Edin. Feb. 2, 1814, (F. C.)—(3.)—Farquharson, Dec. 2, 1800, (No. 3, Ap. Clause).—(4.)—2. Frsk. 3, 57; 2. St. 3, 54; 2. Ersk. 3, 49; Henderson, Aug. 7, 1760, (10179); Hill, July 5, 1774, (10180); Crs. of Ross, June 30, 1714, (Ib.); Robert. Ap. Cases, No. 80; Allan, July 19, 1780, (10265); Stewart, May 18, 1792, (10232); 2. Ersk. 3, 51.—(4.)—4. St. 18, 3, & 4; 2. St. 3, 58, & 59; 2. Bankt. 3, 139; 3. Ersk. 8, 29.

G. Dunlop, W. S.—J. Smyth, W. S.—Agents.

Rev. R. Arthur, Advocator.—*Hutcheson.* J. M'Leish and Others, Respondents.—*Cranstoun—A. Murray—Ivory.*

No. 327.

May 28, 1823.

First Division. Lord Alloway. D.

Implied Obligation.—Arthur raised action against M'Leish, Chrystal, and Grahame, and others, for repayment of £100, which he had advanced to the Second Relief Congregation of Perth, of which he was minister, to purchase a church, alleging, that they were liable to him as managers and members. MacLeish and Chrystal had signed the call and stipend-bond in favour of Arthur, but Grahame had not. It was denied by M'Leish, (who was designed in the bond as a manager of the congregation), that he had ever acted as such, or attended as a member.—By Chrystal and Grahame, it was admitted, that they had occasionally attended as members, and had paid part of the stipend. The inferior court having assoilzied them, the Lord Ordinary, in an advocation,

decerned against them, in respect 'that there is sufficient evidence that these three defenders were all 'members of the congregation in question; and that, 'as such, they have been subjected by the Sheriff of 'Perth to the payment of the advocator's stipend, 'with expences, in which they have all acquiesced;' and, on a representation by M'Leish, his Lordship adhered, in respect 'that the representer subscribed 'the call of the minister, in which he designs himself as a manager or member of the relief congregation; and he mentions that one of his chief inducements to do so, was, to effect an agreement 'betwixt his father and the congregation, for the 'purchase of the church, in part payment of the 'price of which the sum in question was applied; 'and it is not alleged that he ever, by writing or 'otherwise, gave notice that he had withdrawn from 'that congregation, for whose behoof the church had 'been unanimously purchased.' The Court adhered.

J. G. Barr,—Ramsay & Imrie,—T. Walker,—Agents.

No. 328. Geo. Sloss, and J. Gemmill, his Agent, Suspenders. —*Fergusson—Jeffrey.*
T. F. Kennedy, Charger.—*Murray—Rutherfurd.*

May 28, 1823.
Second Division. Lord Cringletie. B.

Writer's Hypothec.—Kennedy having imprisoned Sloss on a meditatione fugæ warrant, the Court, on report of the Lord Ordinary, passed a bill of suspension and liberation. The letters were expede, and appearance made for Kennedy at the calling. The case was thereafter enrolled, of which intimation was made to Kennedy's agent, and the Lord Ordinary pronoun-

ced an interlocutor in absence, suspending the letters simpliciter, and finding expences due. On the day prior to this interlocutor, Sloss, without the knowledge of his agent, agreed to submit the question, but a regular submission was not executed for some time afterwards. Kennedy having represented, and the Lord Ordinary having reponed him against the decreet in absence, his Lordship adhered to that decree on the merits, but altered so as to find no expences due. The case was then taken up by Gemmill, Sloss's agent, who reclaimed, contending, that expences were due, and that his right to them as agent in the cause, could not be defeated by the submission. The Court altered, found expences due, and decerned for them in favour of Gemmill.

A majority of their Lordships considered the rule of law to be that, wherever an interlocutor has been pronounced which awards expences, or necessarily implies that expences are due, the agent's right cannot be defeated by any transaction to which he is not a party.

Suspenders' Authorities.—2. Bell, 39–41–118, and Cases there referred to Hamilton and Jeffrey, June 17, 1813, (F. C.); Rox. July 3, 1818, (F. C.); Kerr, March 7, 1821; Tod and Wright, March 7, 1822, (ante, Vol. I, No. 434).

Charger's Authorities.—Alison's Trustees, Nov. 29, 1808, (2. Bell, 42); Rennie and Playfair, June 8, 1811, (Ibid. Note 3).

J. GEMMILL,—DONALDSON & RAMSAY, W. S.—Agents.

No. 329. D. YOUNG, Advocator.—*Marshall.*
A. and J. M'GILL, Respondents.—*Rutherfurd.*

May 28, 1823.
SECOND DIVISION.
Lord Cringletie.
B.

Agent and Client.—Young having raised action against M'Gills for payment of an account of law expences, they denied the employment, and the inferior court assoilzied them; but in an advocation, the Lord Ordinary and the Court, being satisfied that they had conducted themselves as parties, and had an interest in the cause, decerned against them.

M'MILLAN & GRANT, W. S.—A. M'ALLAN,—Agents.

No. 330. A. SHEPHERD, Trustee on the Sequestrated Estate of John Frazer, Pursuer.—*Jeffrey—Matheson.*
CAMPBELLS, FRAZER, and Co. Defenders.—*Cuninghame—A. Wood.*

May 28, 1823.
SECOND DIVISION.
Lord Robertson.
F.

Bill of Exchange—Promise to Accept.—Anderson, factor for Gordon, proprietor of certain West India estates, having applied to Campbell, Frazer, and Company, the consignees of the produce, to accept an accommodation bill of £500 for Mr. Gordon's use, they wrote that 'your draught on Campbell, Frazer, and 'Company, will meet with honour to the extent you 'mention, and should remittances not be received, and 'that they require it, you can reimburse them in some 'shape until the crop comes round.' This letter was shown by Anderson to Frazer, who advanced £500, and received Anderson's bill on Campbell, Frazer, and Company, for the amount. Before the bill was presented for acceptance, accounts of Mr. Gordon's death had reached this country, and Campbell,

Frazer, and Company, being considerably involved with him, refused to accept Anderson's bill, which Frazer was obliged to retire. He raised action (afterwards carried on by his trustee), against Campbell, Frazer, and Company, founding on their letter to Anderson. In defence, they contended, 1. That their promise to accept was conditional, being dependent on their receiving remittances, either from Mr. Gordon or Anderson; and, 2. That a promise to accept is not binding. The Lord Ordinary having reported the case, the Court decerned against Campbell, Frazer, and Company, under deduction of certain sums recovered by Frazer out of Mr. Gordon's estate.

Pursuer's Authorities.—Clark v. Cook, Selwin's N. P. 281; Beawe's Lex Mercat. 447.

J. M'Kenzie, W. S.—Campbell & Clason, W. S.—Agents.

A. Craig and Company, Advocators.—*Cockburn—Christison.*
R. Hamilton, Respondents.—*Jeffrey—Jameson.*

No. 331.

May 29, 1823.

First Division. Lord Alloway. D.

Sale.—Craig and Company sold a quantity of oats to Hamilton, to be delivered and paid for immediately. He delayed to take delivery, and various written and verbal communications occurred. At the distance of about a fortnight, and when grain had greatly increased in value, Hamilton demanded delivery, which Craig and Company refused, alleging that he had abandoned the sale. In an action for delivery before the magistrates of Glasgow, they, judging from a proof, held, that there had been no

abandonment, and decerned against Craig and Company. But the Lord Ordinary and the Court, being satisfied that the sale had been abandoned, assoilzied them.

W. RENNY, W. S.—H. GRAHAM, W. S.—Agents.

No. 332. J. GIBSON, Pursuer.—*Cranstoun—J. Henderson, Jun. —Gibson Craig.*

Sir P. WALKER and GEO. WALKER, Defenders.—*Solicitor-General Hope—Whigham.*

May 29, 1823.

SECOND DIVISION. Lord Pitmilly. M'K.

Bona and Mala Fides.—In 1791, Sir P. Walker and his brother, G. Walker, acquired right to the office of Deputy-Usher of Exchequer, and emoluments, from John Lord Bellenden, the principal usher. Mr. Gibson purchased, in 1802, at a judicial sale, from the creditors of Lord Bellenden, the office of principal usher, under reservation of the deputation to Sir P. Walker and his brother, 'in so far as 'they have right thereto by their commission.' An action of reduction of the commission was then brought by Mr. Gibson, on the ground, that it was vitiated in substantialibus, by the signature of one of the witnesses being on an erasure, and the word 'witness' not being written by the subscriber, and concluding for the bygone emoluments. The procedure was sisted till 1807, in consequence of an unsuccessful attempt, by the creditors of Lord Bellenden, to set aside Mr. Gibson's title. He then produced his title, proceeded in his reduction, and, on the 24th January 1809, obtained decree in this Court, which was, on the 11th May 1814, affirmed in the House of Peers. A question then arose as to the claim for the bygone

emoluments, which were demanded from the date of citation. The defenders pleaded bona fides, till the judgment reducing their commission, or, at least till 1807. The Lord Ordinary found, 'that the defenders must account to the pursuer for the profits 'and emoluments of the office of deputy-usher of 'Exchequer from the date of citation to this action;' and the Court adhered.

Pursuer's Authorities.—Agnew, July 15, 1746, (1732); Blair, Nov. 18, 1783, (1775); 2. Ersk. 2, 27, 28; 2. Stair, 1, 23.

Defender's Authorities.—2. Stair, 12, 7; and 1, 24; 2. Ersk. 1, 25-27-29; Douglas, July 19, 1664, (7748); Bonny, July 30, 1700, (1728); Leslie Grant, Feb. 9, 1765, (1760); Duke of Roxburghe, Feb. 17, 1815, (F. C.); Turner, March 3, 1820, (F. C.); Bowman, June 11, 1805, (F. C.); Elliot, May 30, 1822, (ante, Vol. I, No. 499).

GIBSON, CHRISTIE, & WARDLAW, W. S.—A. GOLDIE, W. S.—Agents.

A. RITCHIE, Suspender.—*Murray—Robertson.*
J. M'KAY, Charger.—*Cranstoun—Buchanan.*

No. 333.

May 29, 1823.

SECOND DIVISION. Lord Cringletie, B.

Bill of Exchange.—Ritchie, acceptor of a bill drawn on him by his brother, James, (who subsequently became bankrupt, and conveyed his effects to trustees), having been charged on it by M'Kay, an assignee to it, brought a suspension, alleging that the bill was an accommodation one, and that M'Kay was not an onerous holder, having been employed by the trustees to give the charge. The Court, after having granted a diligence for recovery of all pertinent writs, found, that M'Kay was the mere agent of the trustees,—that 'he was not entitled to the privileges 'of a bona fide onerous indorsee,' and remitted to the Lord Ordinary to proceed accordingly.

L. & C. GORDON,—W. DUTHIE, W. S.—Agents.

No. 334.

R. HEDDLE, Pursuer.—*Cranstoun—Buchanan.*
W. S. MONCREIFF, Defender.—*Jeffrey—Moncreiff—Cockburn—Scott Moncreiff.*

May 30, 1823.

FIRST DIVISION.
Lord Alloway.
S.

Sale.

Moodie having conveyed his estate to trustees, for his creditors, it was exposed to public sale. Thereafter, Heddle gave in a private offer for it, which the defender, as agent of the trustees, accepted by this missive.—'I have received your's of this date, 'making offer of £26,100 for the estate of Melsetter, 'in terms of the articles of roup thereof. In answer, 'I do hereby, as acting for the trustees on that 'estate, declare my acceptance thereof, it being ex-'plicitly understood, that no guarantee is to be given 'as to the rents and produce of the estate, or as to 'the titles to those pendicles to which no feudal 'title has been made up in the person of Mr. Moodie, 'or his trustees, or as to any other particulars con-'nected with it. Your offer and this answer shall 'be understood to close the transaction, and the 'titles shall be sent you as soon as I can possibly 'procure them.' By the articles of roup, it was declared, that 'the premises in cumulo, as well as the 'separate lots, are exposed to sale, at a slump sum, 'without regard to any rental, valuation, or fixed 'number of years purchase; and without the ex-'posers undertaking to uphold any measurement, or 'any specification of public burdens, as to all which 'the purchaser shall be understood to have satisfied 'himself before the roup; and no deduction shall be 'allowed from the price or prices, nor shall any delay 'or indulgence be granted in the payment thereof, 'on any account whatever.' Heddle got his title in

the above terms, and paid the price. Thereafter, Heddle raised an action of repetition on the ground of fraud and deceit, alleging that he had been deprived of part of the subjects specified in a printed view, exhibited prior to the date of the articles of roup, and that other parts were either productive of no rent, or of not one-half of that which had been there held forth. The Lord Ordinary assoilzied the defender, in respect of the terms of the title, 'that no information 'in possession of the seller, seems to have been with-'held from the purchaser, or from his agents, who 'acted for him at that period; and that it was ex-'pressly declared, that the purchaser should satisfy 'himself with the rental, the doubtful nature of 'which was mentioned, and an express declaration, 'that no guarantee or warrandice was to be given 'as to the rents and produce of the estate.' To this judgment, both for the above reasons,—and that this was a slump bargain,—and that Heddle was fully aware of the true nature of the estate, the Court adhered.

DALLAS & INNES, W. S.—G. VEITCH, W. S.—Agents.

J. BARBOUR, Trustee on LOWDEN'S Sequestrated Estate, Pursuer.—*Cranstoun—Marshall.*
J. JOHNSTONE, Defender.—*Fullerton.*

No. 335.

Bankrupt—Reduction under Act 1696, c. 5.—Lowden having been incarcerated by Johnstone for payment of a debt, entered into a transaction while in prison, by which he sold certain heritable property to Anderson, on condition that he would pay the debt due to Johnstone. Anderson, accordingly, did so,

May 30, 1823.

SECOND DIVISION. Lord Cringletie. M'K.

by granting and retiring his bill, and Lowden thereupon discharged him of the price. Lowden's estate having been sequestrated, the trustee brought an action of reduction of the bill, and repetition of the amount against Johnstone, on the act 1696, c. 5. Johnstone contended, that although he had got full payment of his debt, it was out of the funds of Anderson, and not out of those of the bankrupt, and that the Creditors had no interest or title to reduce the bill granted by Anderson to him, as that did not affect the bankrupt estate, which could only have been injured by the sale to Anderson, not by the transaction between himself and Anderson. The Lord Ordinary reduced in terms of the libel, and the Court, holding that the transaction was in substance an assignation by the bankrupt, of the price of his lands to Johnstone, in payment of a prior debt, in order to give an undue preference, adhered.

Pursuer's Authorities.—Brown, July 6, 1754, (886); Blackie, March 1, 1796 (887); 2. Bell, 220–2.

Defender's Authorities.—Sir W. Forbes and Co. Feb. 19, 1790, (1191); 2. Bell, 238, Note 1.

W. DALRYMPLE,—W. MARTIN,—Agents.

No. 336. MONKLAND CANAL COMPANY, Pursuers.—*Jardine.*
W. YOUNG, Defender.—*Solicitor-General Hope.*

May 31, 1823.

FIRST DIVISION.
S.

Statute—Clause—Penalty.—By the 10. Geo. III, c. 125, which regulates the navigation of the Monkland Canal, it is enacted, that the owners or master of each vessel shall give a just account of the quantity of goods aboard, to the collector of the tonnage or duties, and in case they neglect or refuse to give

'such account, or shall give a false account, or shall 'deliver any part of their loading or goods at any 'other place or places than what is or are mentioned 'in that account, they shall forfeit and pay to the 'said company of proprietors, &c. the sum of £10 'sterling money, for every ton of goods which shall 'be in such boats or vessels respectively, of which 'such account shall be refused to be given, or of 'which such false account shall be given, or which 'shall be delivered as aforesaid, as the case shall hap-'pen to be, over and above the respective rates and 'duties they are obliged to pay for the same.' Young having delivered an account that a boat contained 28 tons, whereas on being measured there were found to be 31 tons 8 cwts, the Monkland Canal Company raised action against him before the Justices for £10 per ton, of the whole cargo in the boat. His defences were, 1. That the pursuers were bound to prove wilful fraud; and, 2. That the penalty was due only on the excess or that part of the cargo of which an account had not been given. The Justices decerned in terms of the libel, and an appeal having been taken to the Circuit Court, the case was certified. The Court, on advising memorials, altered the interlocutor, and found that the penalty was due on the part only which had not been accounted for.

W. Patrick, W. S.—J. Forman, W. S.—Agents.

No. 337. D. Scott, Suspender.—*Robertson.*
A. Stevenson and A. Scott, Chargers.—*Jardine.*

May 31, 1823.
First Division.
Bill-Chamber.
Lord Balgray.
S.

Bill of Exchange.—A charge having been given to Scott, on his promissory-note, in favour of Stevenson and Scott, he presented a bill of suspension, on the ground that this was one of a series of bills granted by the one party to the other, in the course of certain transactions which resolved into a count and reckoning. The Lord Ordinary passed the bill; but the Court being satisfied that Scott had drawn the proceeds of this note, and had bound himself to retire it when it fell due, altered, and remitted to refuse the bill.

D. Scott, W. S.—A. Stevenson,—Agents.

No. 338. J. Skinner, Complainer.—*Baird—Greenshields.*
D. Paterson, Trustee on A. Cochran's Sequestrated Estate, Respondent.—*Jeffrey—Brown.*

May 31, 1823.
Second Division.
Lord Mackenzie.
B.

Writer's Hypothec—Novation.—Skinner was law-agent, and, as such, held the title-deeds of A. Cochran, senior, of his son, A. Cochran, junior, and of the company of Cochran and Brown, of which Cochran, junior, was the principal partner. Cochran, senior, died in 1812, and was succeeded by his son, who, in 1816, granted to Skinner a promissory-note for the amount of all the accounts. Thereafter the estate of Cochran, junior, was sequestrated, on which Skinner ranked for the accounts, and delivered up the title-deeds belonging to the Cochrans individually,

reserving his hypothec, in virtue of which he claimed a preference. Paterson, the trustee, refused the preference for the accounts prior to 1816, in respect of the promissory-note, for that against the company, as not secured by the hypothec, and for several articles as not proper business charges, Against this judgment Skinner complained, and the Lord Ordinary found that there were 'no sufficient grounds stated for inferring the extinction of Mr. Skinner's hypothec to 'any extent by novation or settlement of accounts; 'that it is not stated by Mr. Skinner, that he has 'delivered up to the trustee, under reservation of his 'hypothec, any writings belonging to the company 'of Cochran and Brown, on which he had preserved 'hypothec as agent for that company; that Mr. 'Skinner has no hypothec on the proper writings of 'Archibald Cochran, senior and junior, for his business account due by the company; and, therefore, 'that he has no preference in this ranking for said 'account: that Mr. Skinner has an effectual hypothec on the papers delivered up to the trustee under reservation for the business-account due to him 'by A. Cochran, senior; but that this account cannot extend beyond the amount at which it stood at 'the death of A. Cochran, senior; that Mr. Skinner has an effectual hypothec for the business-account originally due to him by A. Cochran, junior; 'but that, in this business-account, the following articles cannot be included, viz. duty on 'W. Kerr's legacy,—feu-duties of Gilston,—king's 'duties on legacies,—account for advertising bleachfield,—stamp for inventory of Mr. C. senior's personal estate,—composition for charter from the

'Duke of Buccleugh,—balance of composition fees 'from the town of Mussleburgh, in respect that 'none of these articles are within the necessary, or 'reasonable and ordinary disbursements of a writer 'in carrying on his business;' and he afterwards included within the excepted articles, 'composition 'for entry as singular successor,—paid for 12 copies 'of Walker's sermons,—for inserting advertisements 'in Advertiser,—fees confirmed testament.' Both parties reclaimed, but the Court adhered.

Complainer's Authorities.—(1.)—Ayton, Nov. 27, 1705, (6710); Finlay, Jan. 23, 1773, (6250); Provenhall's Creditors, Aug. 9, 1781, (6253.)—(2.)—Bogle's Creditors, July 8, 1793, (2581); Scott & Hall, June 13, 1809, (F. C.)—(Novation); 3. Ersk. 4, 22; Cowell v. Simpson, 16. Vesey, 265.

Respondent's Authorities.—(1.)—Creditors of Lidderdale, July 5, 1749, (6248).—(2.)—2. Bell, 619, and Cases there referred to.

J. R. SKINNER, W. S.—DONALDSON & RAMSAY, W. S.—Agents.

No. 389. J. HAMILTON, Suspender.—*Moncreiff*—*D. M'Farlane.*
E. MAIN, Charger.—*L'Amy.*

June 3, 1823.

FIRST DIVISION. Lord Alloway. S.

Bill of Exchange—Vitium Reale—Reference to Oath.—Hamilton brought a suspension of a charge on his promissory-note of £60, granted to Main, on the grounds that it had been obtained by fraud and circumvention, while he was intoxicated, and ob turpem causam. In evidence of these allegations, he referred to a judicial declaration emitted by Main, in a complaint against him by the procurator-fiscal relative to this transaction. Main there stated, that he was the keeper of a public house in the High

Street of Glasgow, but had no licence; that Hamilton had resided there for seven days and six nights, and, along with a prostitute, had, during that time, consumed 113 bottles of Port and Madeira, besides a large quantity of spirituous and malt liquors, the value of which, together with food and lodging, amounted to £52 : 6; that Hamilton frequently wandered through the house drunk and naked, and was always in a state of intoxication; and that, before departing, and while sober, he granted his promissory-note for £60, in payment of his account, and as a reward to the prostitute. It was contended by Main, that the plea of drunkenness was not competent in a suspension; that the declaration was not admissible evidence; and that he was entitled to be repaid for the articles consumed. The Lord Ordinary suspended the letters, and the Court adhered. Main then referred the existence of the debt to Hamilton's oath; but the Court holding, that as the bill was utterly vitiated, the diligence of the law could not be allowed to proceed on it, refused the reference, reserving to him to raise an ordinary action.

Suspender's Authorities.—Parker, Nov. 20, 1809, (F. C.); Alison, Dec. 3, 1814, (F. C.); Cantly, Feb. 11, 1790, (9550); Young and Co. July 7, 1790, (9553); Cullen and Co. May 15, 1793, (9554); Duncan, Feb. 8, 1776, (9546); 2. Hume, 333.

Charger's Authorities.—M'Lean, Dec. 5, 1780, (9549); 4. Bankt. 11, 66; 3. Ersk. 1, 16; 4. St. 20, 49.

J. Smyth, W. S.—W. Guthrie,—Agents.

No. 340.

J. Dobie, Pursuer.—*Jeffrey—Fletcher.*
R. Stevenson, Defender.—*Cuninghame—Neaves.*

June 3, 1823.

First Division.
Lord Alloway.
H.

Bill of Exchange—Vitiation—Presumed Payment.—Dobie raised action against Stevenson, on a bill dated 9th September 1791. The defence was payment, which was endeavoured to be shewn from various circumstances and presumptions, strengthened by the age of the bill. The Lord Ordinary decerned in terms of the libel. In a reclaiming petition, it was pleaded, that the date was vitiated; that it had been originally 'Papper Mill, 10 (or 20) Sept. 1791,' and had been converted into 'Papper Millne, 9 Sept. 1791.' But the Court being satisfied that the date had been originally 9th September,—that there was no erasure on the figure 9,—and that there was only the appearance of it on the letters *ne* of 'Millne;' repelled that defence, and adhered to the Lord Ordinary's interlocutor.

Defender's Authorities.—(Erasure).—Murchie, July 1, 1796, (1456).—(Payt.)—Russel, June 13, 1788, (11390); Wallace, Jan. 9, 1759, (1637); Stewart, July 15, 1760, (1638); Wemyss, June 13, 1766, (1644); Colquhoun, Jan. 21, 1767, (1646).

W. Patrick, W. S.—J. T. Murray, W. S.—Agents.

No. 341.

J. Hall and Company, Pursuers.—*Baird.*
C. Armstrong—*Skene—Gillies,* and
Edinburgh and Leith Shipping Company, Defenders.—*Marshall.*

June 3, 1823.

First Division.
Lord Meadowbank.
S.

Sale.—On the 31st of March 1817, Armstrong, a merchant in Dumfries, gave an order to the traveller of Hall and Company of London for a chest of tea; and, on the 3d of April, they invoiced, matted, and

set aside a chest, weighing altogether 116 lbs. They transmitted the invoice on the 12th, stating that they had shipped the chest to Leith by one of the smacks. In point of fact, it was only sent on that day to the wharf. It was put aboard a smack, which sailed on the 20th, and arrived at Leith on the 30th, freight being charged as for a chest of tea. At Leith, a chest, apparently the same, was delivered to a porter, who carried it to the warehouse of a general agent, by whom it was instantly weighed, and found to be 150 lbs., which far exceeded the ordinary weight of such chests. This chest was immediately given to the Dumfries carrier, who delivered it at Armstrong's shop, on the 6th of May, with the agent's note, specifying the weight to be 150 lbs. Armstrong was at this time from home, and did not open it till the 25th of June, when, instead of tea, it was found to contain saw-dust and other rubbish. Having refused to pay the price, Hall and Company raised action against him before the Judge-Admiral, and he brought an action of relief against the Shipping Company. The Judge-Admiral, on advising a proof, decerned against Armstrong, in respect that Hall and Company had established delivery of the chest of tea to the Shipping Company, and that it was actually put on board a smack for Leith; and holding, from the difference of weight between the chest as shipped at London, and when weighed by the general agent at Leith, that the fraud must have been committed while the chest was in the custody of the Shipping Company, he decerned in relief against them. In an advocation, the Lord Ordinary assoilzied the defenders; but the Court altered, found Armstrong liable to Hall

and Company, and ordered a condescendence of his grounds of action against the Shipping Company.

D. Williamson, W. S.—A. Goldie, W. S.—G. Veitch, W. S.—Agents.

No. 342.

J. M'Ara, W. S. Suspender.—*Bell—Gillies.*
T. Watson, Charger.—*Cuninghame.*

June 3, 1823.

Second Division. Lord Cringletie. F.

Bill of Exchange—Vitiation.—M'Ara drew a bill on one Laidlaw, and addressed to him alone, which the latter signed as acceptor. The bill was then indorsed by M'Ara to 'William Watson,' and delivered to Laidlaw, by whom it was transferred to the charger, '*Thomas*' Watson, in payment of cattle bought from him by Laidlaw. T. Watson having charged M'Ara, he suspended, on the ground of vitiation, 1. Because after he had delivered it to Laidlaw, an addition had been made to the address in the bill, of the words 'and to Robert Fletcher, flesher, 'Edinburgh,' who had also signed as acceptor; and, 2. That the indorsation to William Watson had been vitiated, by substituting Thomas for William. To this, it was answered, 1. That the additional acceptance could not invalidate the bill; and, 2. That the alteration from William to Thomas was to correct a mistake. The Lord Ordinary turned the charge into a libel, and decerned against M'Ara;—but the Court altered, and, 'in respect of the alteration in the name of the indorsee,' found, 'that 'it did not afford sufficient ground for summary diligence,' and suspended the letters; 'reserving to 'the charger any claim competent to him in an ordinary action.'

The Judges considered the objection as to the additional acceptor not entitled to any weight.

Suspender's Authorities.—1. Bell, 301; Bryce, Nov. 18, 1810, (F. C.); Callender, Dec. 10, 1812, (F. C.); Chitty, 100-3; Tidmarsh v. Grover, 1. M. & S. 735; Cowie v. Halsall, 4. B. & A. 197.

Charger's Authorities.—Henderson, Feb. 20, 1802, (F. C.); Fairweather, Feb. 12, 1817, (F. C.); Kennedy v. Nash, 1. Starkie, 452; Martin v. Petit, Campbell, 81; Clerk v. Blackstock, 1. Holt, 474.

J. M'Ara, W. S.—Grieg & Pedie, W. S.—Agents.

J. Tweedie, Pursuer.—*Bell—Anderson.*
P. M'Intyre, Defender.—*Moncreiff—Brown.*

No. 343.

June 5, 1823.

First Division.
Lord Alloway.
S.

Bankrupt—Guarantee for Expences of Sequestration.—Tweedie was trustee on the sequestrated estate of D. Graham. The sequestration was settled by a composition, for payment of which, and of the trustee's commission and expences, a bond was granted by J. and A. Grahams, which was accepted by the creditors, approved of by the Court, and the bankrupt discharged. Prior to this, the bankrupt, at the desire of Tweedie, obtained, from M'Intyre, a letter in these terms.—'Mr. D. Graham, Sir, I 'hereby authorize you to propose me as your security for your trustee's commission, and expence of 'sequestration, at such periods as Mr. Tweedie and 'you may agree on after you are discharged.' This letter was delivered to Tweedie, but was not laid before the creditors, nor mentioned in the proceedings relative to the discharge. Tweedie raised action before the Magistrates of Glasgow on this letter against M'Intyre, alleging that it had been granted as a security, in addition to, and independent of that afforded by the judicial bond, and that, on the faith

of it, he had concurred in the discharge. In defence, M'Intyre pleaded, 1. That the letter was a mere offer, and that the creditors not only had not accepted of it, but had received other parties as the cautioners; and, 2. That the letter had not been laid before the Court, and was, therefore, not a ground of the discharge. The Magistrates sustained 'the va-'lidity and obligatory nature of the holograph letter 'of guarantee granted by the defender, as followed 'by the rei interventus of the bankrupt, Graham, 'having obtained his discharge, in terms of the said 'letter,' and decerned against him. In an advocation, the Lord Ordinary, for the same reason, sustained the letter, and remitted to the auditor to tax the account of expences; and the Court, by a majority, adhered.

Two of the Judges were of opinion, that as the letter was not laid before the creditors, nor founded on in obtaining the discharge, it was not binding; but the other Judges held, that the trustee was entitled to take a separate security for his own safety; and that, although not specified, the letter was one of the grounds on which he had declared, when he concurred in applying for the discharge, that he was satisfied as to the expences.

Defender's Authorities.—(1.)—Stair, p. 23 & 94; 1. Maule & Sel. 557; 2. Starkie, 371.

T. Cranstoun, W. S.—J. Crawford, W. S.—Agents.

J. BOYD, Trustee on JAMES ANDERSON'S Estate, Pursuer.—*Moncreiff—More—Grahame.*
M. ANDERSON and Others, Defenders.—*Cranstoun—D. M'Farlane.*

No. 344.

June 5, 1823.

FIRST DIVISION. Lord Alloway. S.

Proof—Proving of Tenor.—The late Hugh Anderson was proprietor of heritable property, of which his eldest son, James, on his father's death, took possession. James was engaged in trade with his mother, and became bankrupt. More than three months prior to this event, he executed a disposition of the heritable property in favour of his mother, himself, his brothers, and sisters, on the narrative, that his father had made a trust-deed to the same effect, which had been destroyed after his death. Boyd, as trustee for James Anderson's creditors, brought a reduction of this disposition, on the act 1621, c. 18, and on fraud. The defences were, 1. Solvency; and, 2. That the bankrupt, in consequence of the trust-deed, was under an obligation to grant the disposition. The Lord Ordinary, after finding, 'that the 'obligation depends upon the fact, whether the 'deed, executed by his father, was in existence at 'his father's death? and whether, at that period, it 'had been concealed or put out of the way?' granted a diligence for the examination of havers; and, thereafter, found 'it sufficiently instructed, by the 'oaths of the parties examined as havers, that the 'settlement of the late Mr. Anderson cannot be pro-'duced, as it was, after the death of Mr. Anderson, 'destroyed by some of the parties examined as ha-'vers; but as the terms of that deed are not esta-'blished, and it is not competent to do so in the

'present action, which merely relates to the production of that deed, sists process until the defenders 'shall bring an action for proving the tenor of the 'deed, so as to instruct that the provisions therein 'contained are equal in amount to those contained 'in the new deed under reduction.' Both parties reclaimed. The pursuer maintained, that the fact of the deed not having been destroyed till after the death of the father, could not competently be proved by the evidence of havers:—and the defenders, that as a proof of the terms of the deed was necessary only to establish a defence, and not to constitute a permanent right, a proving of the tenor was not requisite. But the Court adhered.

Defenders' Authorities.—Maxwell, Nov. 9, 1742, (15820); Synod of Merse, Nov. 21, 1753, (15823); Kennoway, Feb. 18, 1752, (12438); 4. St. 41, 4; 4. Ersk. 1, 52; 1. Phillip's L. of Evid. 458.

W. & A. G. ELLIS, W. S.—C. J. F. ORR, W. S.—Agents.

No. 345.

J. PEDIE, W. S. Pursuer.—*Clerk—Greenshields.*
J. DRYSDALE, Defender.—*Brownlee.*

June 5, 1823.

SECOND DIVISION. Lord Cringletie. B.

This was an action against Drysdale for payment of an account of law expences. But the Lord Ordinary and the Court, finding the employment not proved, assoilzied him.

J. PEDIE, W. S.—J. M'ANDREW,—Agents.

J. WARBURTON, Pursuer.—*Gordon.*
EARL of STRATHMORE, Defender.—*Clerk—Cuninghame.*

No. 346.

June 5, 1823.

SECOND DIVISION. Lord Cringletie, B.

Stat. 17. *Geo. III, c.* 26—*Process.*—Warburton, as assignee to a bond of annuity executed in England by Lord Strathmore, in favour of one Auriol, and bearing to be granted for money actually paid down, pursued his Lordship for arrears. Lord Strathmore pleaded, in defence, 1. That the bond had in reality been granted in payment of pictures purchased by him from one Princep, and that Auriol's name had been merely introduced to evade the stat. 17. Geo. III, c. 26, and that it was, therefore, null in virtue of that act, which provides, that, if 'any part of the 'consideration' of bonds of annuity 'is paid in goods,' the bond shall be null; and, 2. That Warburton had lodged a claim in Chancery, which constituted a lis alibi pendens. To this last defence it was answered, that the claim in Chancery, which had been lodged subsequently to the raising of this action, was in consequence of an order in Chancery on all Lord Strathmore's creditors to lodge their claims, made in proceedings to which his Lordship was not a party; and, as to the first defence, a proof was allowed. This, however, not being adduced, (although the commission was repeatedly renewed), the Lord Ordinary decerned against him, and the Court adhered, refusing to allow farther time for the proof again offered to be adduced.

P. IRVING, W. S.—JAS. HAMILTON, W. S.—Agents.

No. 347. D. MORRISON and Others, Pursuers.—*Cranstoun—More.*
W. ROBERTSON, Defender.—*Clerk—Forsyth.*

June 5, 1823.
SECOND DIVISION.
Lord Cringletie.
B.

This was a question of circumstances. Morrison, &c. pursued for reduction of a decreet-arbitral in a submission between them and Robertson, on several grounds. But, as they failed to make out their allegations, the Court repelled the reasons of reduction.

A. PATERSON,—R. CARGILL, W. S.—Agents.

No. 348. J. CHAMBERS, Pursuer.—*Walker.*
MRS. LAW, Defender.—

June 6, 1823.
FIRST DIVISION.
Lord Alloway.
S.

Prescription—Redeemable Right.—On the 22d of January 1701, John Young granted an heritable bond, or deed of annual rent, over certain subjects in the burgh of Peebles, of which he was proprietor, in favour of John Nielson and his heirs. The deed contained a clause of redemption, and sasine was taken on it, 'redeemable always, and under reversion,' and duly recorded. In 1752, James Nielson, the representative of John, granted an absolute disposition of the subjects, for an onerous cause, to Thomas Law, who was infeft on 18th August 1752. By a contract of marriage, Law disponed them in liferent to his wife, who was infeft on 29th March 1773. These sasines were duly recorded, and the subjects were possessed on them by Law, his wife, and the defender, his daughter and representative, till August 1820. An action of declarator of redemption of right to the property, and of removing, was then brought by

Chambers, the heir of Young. The defence was, the positive prescription, by possessing on unqualified rights for more than forty years, and that any title which Chambers or his ancestors might have had was cut off by the negative prescription. To this it was answered, that the foundation of the defender's title was the redeemable heritable bond and sasine, which was not subject to prescription. The Lord Ordinary assoilzied the defender, 'in respect that she has pro-'duced a sufficient title to exclude far beyond the 'years of prescription, and in respect of the decision 'of the Court, Munro against Munro, May 19, '1812.' The Court refused a petition, without answers.

Pursuer's Authorities.—1617, c. 12; 3. Ersk. 7-10; Elliot, Jan. 1727, (10977); Bell on Titles, 146.
Defender's Authorities.—Munro, May 19, 1812, (F. C.); Paul, Feb. 8, 1814, (F. C.)

R. JAMIESON, W. S.—BURD, M'MILLAN, & MILLAR, W. S.—Agents.

W. GUTHRIE, Petitioner.—*L'Amy—Ro. Bell.*
J. CURL and Others, Respondents.—*Greenshields—D. M'Farlane.*

No. 349.

June 6, 1823.

FIRST DIVISION.

S

A. S. 6th February 1806.—Guthrie, the law-agent in the sequestration of the estate of Paterson and Co., which had been settled by a composition, presented an application under the A. S. 6th February 1806, to have his account of expences taxed, and for decree against the creditors. They opposed the prayer on various grounds; but the Court being satisfied from a proof, that Guthrie had been paid by

the trustee, and that the object of this action was to relieve the latter, dismissed it.

J. GEMMILL,—T. JOHNSTONE,—Agents.

No. 350. T. LAWRIE, Pursuer.—*Clerk—Greenshields.*
J. STEWART and Others, Defenders.—*Forsyth—Cathcart.*

June 6, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Cautioner—Relief.—Menzies entered into a private contract with his creditors, to pay a composition on his debts, in three instalments. For the last of these instalments, the pursuer, Lawrie, with Stewart and others, became cautioners in a bond to a trustee. Lawrie bound himself for £500, Stewart for £1,000, and the other defenders for £300 each, 'or such 'parts or portions of the said sums respectively, as 'shall be found necessary for paying the said last 'instalment of the said composition; and that ac-'cording to the amount of the said sums, subscribed 'by us respectively,' so as to enable the trustee to pay the last instalment, 'or the deficiency that may 'remain thereof.' It was then declared, that each was to be liable only to the extent of the sum for which he bound himself, and no farther. By a transaction between the bankrupt and the defenders, they were secured against any loss; but Lawrie was obliged to pay the £500 which he had subscribed. He then brought an action against the defenders, to compel them to communicate to him a proportional part of the relief which they had obtained. They maintained, that they were not obliged to do so, because they were not joint cautioners: The Lord Ordinary

assoilzied them, in respect, 'that the defenders were 'not correi with the pursuer; but that each of the 'parties was bound to the amount of his own indivi-'dual subscription, in the same manner as if the 'obligations had been granted by separate and dis-'tinct bonds.' And the Court, on advising two petitions and answers, by a majority, adhered, but found no expences due.

Two of the Judges were of opinion, that the parties were engaged in a commune negotium,—being cautioners for the same person, the same debt, and to the same creditors; and, therefore, were truly joint cautioners, and, as such, bound to communicate the benefit of any separate relief. But the other three Judges agreed with the opinion of the Lord Ordinary.

Pursuer's Authorities.—S. Ersk. 3, 68; Campbell, July 18, 1775, (2132); Milligan, May 20, 1802, (2140).
Defenders' Authorities.—S. Ersk. 3, 70; Creditors of Fisher, Dec. 18, 1778, (2134); Evans, Pothier, Oblig. Ap. vol. ii, p. 67.

W. Patrick, W. S.—T. Johnstone,—Agents.

Hon. H. Bellenden and Others.—*Clerk—Moncreiff—Fullerton.*
Trustees of Lady Essex Kerr.—*Cranstoun—Bell—Forsyth.*
Competing.

No. 351.

June 6, 1823.

First Division.
Lord Meadowbank.

Service—Abandonment of Title—Adjudication on Trust-Bond.—John Duke of Roxburgh, in 1803, granted a mortis causa trust-disposition of his unentailed property, for payment of debts, and other purposes to be afterwards declared, in favour of Mr.

S.

Wauchope. On the 19th of March 1804, he executed a deed of instructions relative to the disposal of the residue of his property, and died on the next day. Mr. Wauchope was infeft on the 22d April 1805. Lady Essex and Lady Mary Kerr, the sisters and heirs-portioners of the Duke, adopted two courses in order to establish their title to the lands. 1. They granted a trust-bond to the Earl of Winchelsea, under which, in August 1804, he raised and executed against them letters of special and general charge as heirs-portioners of their brother, obtained decreet of adjudication in May 1805, and disponed the lands, and assigned the adjudication to them on the 3d of July 1812; but no infeftment was, during their lives, taken on this deed; 2. The other course followed was, by raising an action concluding for reduction of the deed of instructions, inter alia, on deathbed, and for decree, ordaining Mr. Wauchope to convey to them the lands. In November 1806, the Court decerned in the reduction; and, in December 1818, ordained Mr. Wauchope to execute proper conveyances. This he did in January 1815, by granting a disposition with precept and procuratory; and, in virtue of the precept, Lady Essex and Lady Mary were duly infeft in March 1815.

Under this state of the titles they possessed the lands till 1818, when Lady Mary died. On that event, Lady Essex procured herself served heir in general to her sister, expede a crown-charter of resignation and confirmation on Mr. Wauchope's procuratory, and was infeft in December 1818. Lady Essex Kerr died in 1819, leaving a general disposition of all her heritable and moveable property in favour of trustees. With the view of making up a title to the

lands, the trustees, in June 1820, raised and executed letters of general charge against the Honourable H. Bellenden and others, as heirs-portioners of Lady Essex, and brought a summons of constitution, which they intended to follow up by an adjudication in implement. This latter step they, however, did not adopt; but, in February 1821, they expede a charter of adjudication in virtue of the decreet of adjudication obtained and assigned by the Earl of Winchelsea, and were infeft in March of that year.

The heirs-portioners, in the meanwhile, got themselves served in this character in special to Lady Essex Kerr, and were infeft in April 1821. They then granted a precept of clare constat in their own favour as heirs-portioners of line of Lady Mary, and were infeft in June thereafter, in her pro indiviso half of the lands.

A competition having arisen between the trustees of Lady Essex, and the heirs-portioners for Lady Mary's pro indiviso half, a multiplepoinding was raised in name of the tenants to settle this question. By the heirs-portioners it was maintained, 1. That the feudal right of the half pro indiviso was vested in Lady Mary by the infeftment under the precept granted by Mr. Wauchope; that the general service of Lady Essex, and infeftment under the procuratory, only conveyed to her the *superiority*, but that the *property* remained in hereditate jacente of Lady Mary, and had never been taken up till it had been done so by means of their special service; and, 2. That the adjudication on the trust-bond, which had been deduced and conveyed by the Earl of Winchelsea, was a mere tentative title, which had been abandoned by the disposition and infeftment from Mr.

Wauchope. On the part of the trustees it was contended, 1. That a proprietor possessed on all his titles, and had a right to ascribe his possession to any of them he chose,—that the disposition and assignation of the adjudication by the Earl of Winchelsea, was a valid conveyance of all the lands descending from the Duke of Roxburgh,—that it was not incongruous with, but fortified the title from Mr. Wauchope,—that it had never been abandoned,—that Lady Mary's interest in it had been transmitted to her sister, by the general service, and was now vested in them by the trust-deed; and, 2. That by serving heirs-portioners of Lady Essex, their opponents had incurred a passive title; that by her service, she had acquired a right to the property belonging to her sister, which she had conveyed to them, and that, therefore, her representatives were bound to give it effect. The Court, on the report of the Lord Ordinary, preferred the heirs-portioners, and remitted to his Lordship to proceed accordingly.

The Judges held, 1. That a feudal right to the property had been constituted in favour of Lady Mary, by the infeftment on Mr. Wauchope's precept,—that Lady Essex had not adopted the proper means to vest it in her person,—and that it remained in hereditate jacente of Lady Mary, till taken up by the heirs-portioners; and, 2. That the adjudication had been abandoned by reverting to the title from Mr. Wauchope.

Authorities of Heirs-Portioners.—(2.)—Robertson, Nov. 27, 1751, (3044); Erskine, Dec. 19, 1710, (2846); Duke of Gordon, Feb. 15, 1750, (9602) 3. St. 2, 1, & 2; 3. Ersk. 3, 47; 2. Ersk. 1, 1.

Authorities of Trustees.—(1.)—1. Bell, 641, and Case there; Smith and Bogle, June 30, 1752, (10803); Durham, Nov. 24, 1802, (11220); Harvie, Dec. 12, 1811, (F. C.); Edgar, July 6, 1736, (3089); Zuille, March 4, 1813,

(F. C.); Bell on Titles, 316; 2. Ross, 173; Bishop of Aberdeen, July 15, 1680, (3012); 3. Bankt. 2, 13; Douglas, July 10, 1713, (3008); Macdoual against Hamilton, Jan. 19, 1793, (not rep.)—(2.)—Carmichael, Nov. 15, 1810, (F. C.); (Aff. May 15, 1816.)

A. GOLDIE, W. S.—A. CAMPBELL & J. THOMSON, W. S.—Agents.

B. ELEMING and R. WALKER, his Assignee, Pursuers.—*Jeffrey—Jameson.*
HARLEY'S Trustees, Defenders.—*Clerk—Skene—Shaw.*

No. 352.

June 6, 1823.

SECOND DIVISION.
Lord Pitmilly.
B.

Sale.—Fleming, in 1817, purchased from the trustees of Harley, a bankrupt, an area of building ground in Glasgow, and granted his bill for the price; the trustees, at the same time, binding themselves to put Fleming in possession, and also to give him good and sufficient 'rights,' and 'in the event of their not 'putting him in possession, or furnishing him with 'sufficient rights,' they bound themselves 'to fur-'nish him with money to pay the abovementioned 'bill.' This bill was retired by Fleming, who obtained possession of the premises, but from the nature of the subject, he could draw no profits from it; and as the trustees were unable, in consequence of certain subsisting incumbrances, to give a title, he could neither dispose of it nor build on it. After a delay of three years, the trustees being still unable to furnish a title, Fleming raised action (afterwards carried on by Walker), for repetition of the price with interest, and for damages. The Lord Ordinary having appointed the trustees to furnish a sufficient title to the subjects within a certain time, on their

failure so to do, decerned in terms of the libel, and the Court adhered.

Defenders' Authority.—3. Ersk. 3, 79.

G. M'Dowall,—Gibson, Christie, & Wardlaw, W. S.—Agents.

No. 353. B. Fleming and R. Walker, Pursuers.—*Jeffrey—Jameson.*
Harley's Trustees, Defenders.—*Clerk—Skene—Shaw.*

June 6, 1823.

Second Division. Lord Pitmilly. B.

Sale—This was an action arising out of the circumstances of the preceding case, concluding to have it declared, that Fleming was no longer bound by the agreement of sale, 'in consequence of the repeated delays and refusals of the defenders to clear 'off said incumbrances, and to give the petitioner a 'complete and valid, as well as free and unaffected 'title to the said property.' The Lord Ordinary decerned in terms of the libel. The trustees reclaimed, and offered now to give a complete title, but Fleming insisted, that after a delay of so many years, he was not bound to accept a title, and, at any rate, that the title was defective, and that the trustees, who had been nominated by a voluntary deed, could not now give a title, in consequence of a supervening sequestration of Harley's estate. The Court adhered.

Pursuer's Authorities.—Hunter, Jan. 17, 1822, (ante, Vol. I, No. 267); 2. Bell, 235, 289, 290, and Cases there referred to.

G. M'Dowall,—Gibson, Christie, & Wardlaw, W. S.—Agents.

LADY KENNEDY and HUSBAND, Pursuers.—*Solicitor-General Hope—Granstoun—Skene.*
J. INNES, Defender.—*Forsyth—Moncreiff.*

No. 354.

June 6, 1823.

SECOND DIVISION.
Lord Cringletie.
F.

Tutor and Curator.—Allardyce died possessed of heritable and moveable property, and particularly of Bank of England stock. He left an only child, Miss Allardyce, who was minor, and to whom he named Innes and others tutors and curators. With part of the Bank stock, they purchased certain lands, the titles of which they took in their own names. Thereafter, proposals of marriage having been made to Miss Allardyce by Lord Kennedy, a draft of an antenuptial contract was prepared, but before execution, the marriage was solemnized. His Lordship soon afterwards executed settlements in favour of his wife; and on her attaining majority, the tutors were required to transfer the lands and stock to her. Innes refused to do so, alleging that the postnuptial deeds were not agreeable to the arrangements originally made. An action was, therefore, raised, to compel the tutors to convey the lands and Bank stock to her Ladyship in fee-simple. The Lord Ordinary ordained them to denude of the lands in favour of Lord and Lady Kennedy, in terms of the postnuptial contract of marriage, 'they always, before extract, producing in process a ratification 'both of the said contract, and ratification thereof 'made on oath, in presence of a magistrate.' But the Court holding, that the tutors had no right to take the titles in their own names, or to withhold the property from Lady Kennedy who was of full age, and that they were bound to denude in the terms

that her Ladyship required, recalled the Lord Ordinary's interlocutor, decerned as to the lands, in terms of the libel, and remitted to his Lordship as to the Bank stock, which was not embraced by his interlocutor.

J. & A. SMITH, W. S.—P. CROOKS, W. S.—Agents.

No. 355. J. FRASER, Suspender.—*Cockburn—D. M'Farlane.*
SIR W. C. FAIRLIE, Charger.—*Greenshields.*

June 7, 1823.

FIRST DIVISION. Bill-Chamber. Lord Balgray. S.

Sir W. C. Fairlie having granted a tack of a distillery to Fraser, and charged him for payment of rent, a bill of suspension was presented by Fraser, who alleged that the tack was intended to conceal a partnership in which he was engaged with the charger, and founded on various circumstances, to show that the charge was given for the purpose of oppression. The Lord Ordinary refused it in respect of no caution; but the Court passed it simpliciter.

GREIG & PEDDIE, W. S.—J. GEMMEL,—Agents.

No. 356. J. SHERIFF, Pursuer.—*A. Lothian.*
D. J. DICKSON, Defender.—*Pringle.*

June 7, 1823.

FIRST DIVISION. D.

Cessio.—Decree of cessio was here opposed on the alleged concealment of funds; but the Court, after advising a condescendence by Dickson, being satisfied that the allegation was unfounded, decerned in the cessio.

D. GRAY,—SCOTT & FINLAY, W. S.—Agents.

J. AITCHISON, Suspender.—*More.* No. 357.
MAGISTRATES of GLASGOW, Chargers.—*Jardine.*

June 7, 1823.

SECOND DIVISION.
Bill-Chamber.
Lord Cringletie.
B.

Decree in Foro.—Aitchison having been charged to pay arrears of rent, under a decree of this Court in foro, suspended, on the allegation, that subsequent to a part of the rents charged for having become due, he had been sequestrated and discharged on payment of a composition. The Lord Ordinary refused the bill, and the Court adhered, in respect of no caution being offered.

R. HENDERSON,—W. DICKSON, W. S.—Agents.

J. VANS AGNEW, Suspender.—*Jeffrey—Shaw.* No. 358.
T. GRIERSON, Charger.—*A. Bell.*

June 7, 1823.

SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
B.

Expences—Bill-Chamber.—Grierson having charged Mr. Agnew on a decree in foro, a bill of suspension was presented, which the Lord Ordinary, after advising with the Court, of consent, passed on caution, but found Mr. Agnew liable in expences. He reclaimed, and contended, that in the circumstances, the bill ought to be passed simpliciter; and that, at all events, he could not be found liable in expences. The Court recalled the finding relative to expences, as incompetent in hoc statu, but adhered quoad ultra.

Suspender's Authorities.—A. S. March 7, 1782; Smith, Jan. 26, 1799, (8043)
Pursuer's Authority.—2. Bell, 598.

J. S. ROBERTSON, W. S.—T. GRIERSON, W. S.—Agents.

No. 359. N. WILSON and Others, Suspenders.—*Moncreiff—Rutherford—A. Dunlop, Jun.*
J. KIPPEN and Others, Chargers.—*Clerk—Forsyth.*

June 7, 1823.

SECOND DIVISION. Lord Pitmilly. M'K.

Society—Title to Pursue.—A schism having taken place among the members of the Greenock Coffee-room, (which was managed by a committee chosen annually by the majority of the subscribers), Kippen and others, designing themselves 'a majority of the 'committee of management of the Greenock Coffee-'room for the year 1819,' and 'the committee of 'management of said Coffeeroom for the year 1820,' raised action before the Sheriff of Renfrewshire, concluding that the furniture should be declared 'their 'property,' 'as managers,' and for warrant of delivery to them, 'as managers aforesaid,' and of sale, to pay off the debts of the society, and consignation of the balance. Appearance was made for Wilson and others, individual members of the association, who objected to the title of Kippen, &c. to pursue. The Sheriff, sustained the title of the chargers, and decerned in terms of the libel. Wilson, &c. suspended, on the ground that Kippen, &c., as office-bearers of a self-constituted society, had no title to pursue. For the chargers it was contended, that, having an individual interest to pursue, as members of the society, their title, as such, could not be taken away by their having designed themselves office-bearers; and, further, that by the minutes of a meeting of the majority of subscribers, signed by them individually, authority was given to the committee 'to take such steps as 'by them shall be deemed most eligible for securing 'their right in the furniture, &c.' which, it was maintained, constituted a mandate from the individual

members to pursue for their behoof. The Lord Ordinary found, 'that the pursuers have no right to insist in the character of managers or office-bearers of the Greenock Coffeeroom, which is not an incorporation, or to maintain in that character the conclusions of the libel;' and 'that their title is not established by the minutes on which they found;' and he accordingly suspended the letters simpliciter. The Court, after having ordered and considered 'minutes of debate, stating particularly and precisely from the record the style and character in which parties have come into Court in cases similar to the present,' adhered to the Lord Ordinary's interlocutor.

The Court considered the difference between this case, and that between the same parties decided in the First Division, (ante, Vol. I, No. 343) to be, that, in the latter, Kippen, &c. were defenders; and that, although they had at first appeared as office-bearers, they had afterwards, in the inferior court, sisted themselves as parties for their individual interests.

Suspenders' Authorities.—Lodge of Lanark, June 11, 1730, (14554); Crawford, June 13, 1761, (1958); Lawson, July 7, 1810, (F. C.)
Chargers' Authorities.—Wilson, Dec. 13, 1771, (14555); Allan, May 25, 1791, (14563); Wilson, Feb. 6, 1822, (ante, Vol. I, No. 343).

M'Millan & Grant, W. S.—R. Rutherford, W. S.—Agents.

Sir P. Walker, Pursuer.—*Jeffrey—Cockburn—Whigham.*
Sir D. Milne and Others, Defenders.—*Moncreiff—M'Neill.*

No. 360.

June 10, 1823.
First Division.
Lord Meadowbank.
S.

Reparation—Locus Pœnitentiæ.—Sir P. Walker raised an action against Sir D. Milne and others, subscribers for a monument to the late Lord Melville, alleging that they had entered into a contract with

him, to place it upon his property of Coates, near Edinburgh; that they had taken possession of the site; had broken it up; had performed several other operations on it; and that he had been thus induced to make various alterations on his plans for feuing his ground, and on the drains and levels. He, therefore, concluded for implement of the agreement; or, at least, for damages. In defence, it was stated, that although there had been a communing, no contract had been completed; that even although there had been an agreement, yet, as it related to heritage, and was not constituted by writing, there was locus pænitentiæ; and that as there was no binding contract, no damages could be due for resiling. The conclusion for specific implement was afterwards departed from, in consequence of the monument being erected in St. Andrew's Square; and the Lord Ordinary, in respect that no binding contract had been completed, and that the facts alleged were not sufficient to bar locus pænitentiæ, assoilzied the defenders. But the Court, while they agreed with his Lordship, that no effectual contract had been concluded, altered the interlocutor so far as it assoilzied the defenders, and found 'that 'the pursuer is entitled to indemnification for any 'actual loss and damage he may have sustained, and 'for the expences incurred in consequence of the al-'teration of the site of the monument;' and after ordering a condescendence, remitted to the Lord Ordinary to proceed accordingly.

Pursuer's Authorities.—S. Ersk. 3, 3; Lawson, June 28, 1699, (8402); Buchanan, Dec. 15, 1773, (8481); Graham, Jan. 2, 1685, (8472); Lyon, July 20, 1699, (7555).

Defenders' Authorities.—Sheddon, July 6, 1768, (8456); Gardner, Feb. 16, 1770, (8457); M'Farlane, May 22, 1790, (8459); Barrow, Jan. 23, 1794, (8463).

A. Goldie, W. S.—A. Douglas, W. S.—Agents.

A. NISBET, Pursuer.—*Clerk—Fullarton.* No. 361.
SIR D. MONCRIEFFE, Defender.—*Murray—Keay.*

June 10, 1823.

FIRST DIVISION.
Lord Alloway, H.

Entail.—By the entail of Cappledrae, the heirs of entail are prohibited, under irritant and resolutive clauses, 'to sell, alienate, impignorate, or dispone 'the said lands and estate, or any part thereof, 'whether irredeemable or under reversion, nor *to 'burden the same*, in whole or in part, with debts or "sums of money, &c. whereby the said lands and 'estate, or any part thereof, may be affected, ap-'prised, adjudged,' &c. Sir D. Moncrieffe, the heir in possession, contracted a debt by bill to Mr. Nisbet, who brought an action to have it found, that the estate was attachable for the debt. His plea was, that the entail did not prohibit the contraction of personal debts, but only that the heirs should not burden the estate with them, which could not prevent him from proceeding against it by legal diligence. The Lord Ordinary reported the case, observing in a note, that there was a finding by Lord Gillies in the Inches entail, which was adhered to by the Court, favourable to the plea of the pursuer. But the Court being satisfied, that the objection to the entail was unfounded, and that the point had been decided by the case of M'Kenzie, (see ante, Vol. II, No. 313), assoilzied the defender.

Pursuer's Authorities.—Sinclairs, Nov. 8, 1749, (15382); Bruce, Jan. 15, 1799, (15539); 2. Ersk. 3, 49; 1. Bell, 585, Note; Dallas, p. 587; Russell on Convey. 287; Smollet's Crs., May 14, 1807, (No. 12, Ap. Tailzie).
Defender's Authorities.—Cuninghame, Nov. 14, 1739, (4135); Henderson, Aug. 7, 1760, (4141); Scott, July 18, 1722, (3673); 2. Bankt. 3, 142; 3. Ersk. 8, 30; Elch. No. 9, Tailzie.

CARNEGY & SHEPHERD, W. S.—G. DUNLOP, W. S.—Agents.

No. 362. R. Brown, Advocator.—*Shaw—A. M'Neill.*
M. Brown, Respondent.—*J. W. Dickson.*

June 10, 1823.
Second Division.
Bill-Chamber.
Lord Mackenzie.
F.

Submission.—Robert Brown presented a bill of advocation of a judgment of the Sheriff of Stirlingshire, in so far as it decerned against him for payment to Malcolm Brown of a certain item in an account, which he alleged was embraced by a submission entered into between them. The Lord Ordinary and the Court being satisfied, that the article in question did not fall under the submission, refused the bill.

C. Fisher,—A. Bayne,—Agents.

No. 363. J. Brysson, Pursuer.—*Baird.*
M. Mitchell, Defender, et e contra.—*More.*

June 10, 1823.
Second Division
Lord Pitmilly.
F.

Submission—Decreet-Arbitral.—Brysson and Mitchell entered into a building contract, and they agreed that all disputes should be settled by two persons named as arbiters, with power to appoint an oversman. The arbiters did not accept of this submission until more than a year after its date; and, before proceeding to determine any disputed matters, they named an oversman. Thereafter, having pronounced an interim decreet against Brysson, he raised an action of reduction of it, and Mitchell brought an action for payment of the sum awarded by it. These actions were conjoined. Brysson contended, as grounds of reduction; 1. That the submission had expired by the lapse of a year, before acceptance; and, 2. That the arbiters, having appointed an oversman before

pronouncing the decreet under reduction, had thereby devolved on him their powers, and were no longer competent to pronounce a decision. The Lord Ordinary repelled both reasons of reduction;—the first 'in respect the submission formed a part of a contract for erecting certain buildings, and was entered into for the express purpose of settling all 'claims and accounts that might arise in the course 'of the work, and especially authorized the arbiters 'named in the contract 'from time to time to report "their decision upon any debateable question that "may arise in the execution of the work, until the "whole of the matter be brought to a conclusion, "and finally wound up;" and the second, 'in re-'spect the oversman was correctly named by them, 'in pursuance of their powers to that effect, in case 'of their afterwards differing in opinion, and that 'no difference of opinion having taken place, they 'were bound to proceed, notwithstanding the nomi-'nation of an oversman;'—and he decerned for payment against Brysson. The Court adhered to the findings of the interlocutor, but remitted to the Lord Ordinary to hear parties as to certain allegations of corruption which Brysson made in his reclaiming petition.

W. Waddell, W. S.—A. Smith, W. S.—Agents.

No. 364. PRESBYTERY of INVERNESS, Pursuers.—*Jeffrey—Buchanan.*

T. A. FRASER and CURATORS, and the Rev. C. FRASER, Defenders.—*Gordon—Cockburn.*

June 10, 1823.

SECOND DIVISION. Lord Cringletie. F.

Personal Exception.—Fraser of Lovat, a minor, and a Roman Catholic, residing abroad, executed, with consent of his three curators, (two of whom were Roman Catholics), a commission in favour of one of their number, Morrison, a protestant, to present ministers to the churches of which Lovat was patron. The church of Kiltarlity, (which was in Lovat's gift), was vacant at the time; and Morrison, having qualified himself as commissioner, granted a presentation to the Reverend C. Fraser, a regularly licensed preacher of the church of Scotland. Mr. Fraser laid his presentation before the presbytery of Inverness, along with an opinion of the procurator of the Church, in favour of its validity; and they, (as appeared from their minutes), 'did determine to receive the presentation, and proceed in the business, subject to 'this condition, viz. that in case the procurator should 'make a different return to the presbytery's statement, from that read by the said Mr. Anderson to 'this meeting, the presbytery shall then sist proceedings, and hold themselves bound to be regulated by the procurator's advice.' The presentee and the procurator for the patron having acquiesced in this condition, the presbytery, 'on this acquiescence and 'understanding,' resolved to proceed with the preliminary steps for admitting Mr. Fraser. The procurator of the Church declined to give any opinion on the memorial submitted to him by the presbytery, because he had already been consult-

ed by the patron: but the presbytery were advised by other counsel, that the presentation was void. After some steps had been taken preparatory to the admission of the presentee, and considerable delay incurred by opposition on the part of the parishioners,* the presbytery refused to proceed further, and raised an action of declarator against the patron, the presentee, and the officers of state, to have it found, 1. That Lovat being a Roman Catholic, and an avowed papist, having neither taken the oaths to government, nor purged himself of popery, in terms of the 10th of Queen Anne, c. 12, the presentation was null; and, 2. That the right of presenting had fallen to them, as the crown had not presented within the six months allowed by the act. No appearance was made for the crown; but Lovat and the presentee pleaded, that the presbytery having received the presentation, were now barred from objecting to it, and refusing to settle the presentee. The Lord Ordinary reported the case; and the Court, by a majority, dismissed the action.

The majority of the Judges held, that the proceedings of the presbytery were calculated to induce the officers of state to believe, that the presentation was valid; and that, consequently, the presbytery could not avail itself of the delay thence arising. But the minority considered this a defence peculiar to the crown; that as no appearance was made on its behalf, no other party could avail themselves of it; and that, at all events, a public body could not be barred personali exceptione, from exercising a right vested in them for the behoof of the community.

Hugh M'Queen, W. S.—J. Morrison, W. S.—Agents.

* See ante, Vol. I, No. 410.

No. 365. C. C. MARQUIS, Advocator.—*Sandford.*
P. RITCHIE, Respondent.—

June 11, 1823.

FIRST DIVISION. Lord Meadowbank, D.

Periculum—Proof—Onus Probandi.—Ritchie raised an action against Marquis for the price of a horse, which he alleged he had hired to him in a sound state, but which was returned to him with its leg broken above the knee. The inferior court, after allowing a proof, decerned for its value; and the Lord Ordinary, in an advocation, adhered, in respect that it was established that the horse was sound when hired,—that, when it was returned to Ritchie, its leg was broke above the knee,—and that 'it is fixed by the decision in 'the case of Ogle, that, in such circumstances, it is 'incumbent on the person by whom the horse has 'been hired to establish that the injury sustained 'could not be prevented by due care and attention 'on his part, and was occasioned by that for which 'he was in no respect to blame; and that the de-'fender has failed to bring proof to that effect.' The Court refused a petition, without answers.

Advocator's Authorities.—S. Ersk. 1, 21; 6. Jones, 611 & 602; Cooper, 3. Camp. 5.
Respondent's Authority.—Robertson, June 23, 1809, (F. C.)

No. 366. J. CAMPBELL, Suspender.—*Greenshields.*
R. MONTGOMERIE and MANDATORIES, Chargers.—*Cuninghame.*

June 11, 1823.

FIRST DIVISION. Lord Meadowbank. S.

Mandatory—Process.—Campbell raised action against Montgomerie, from which the Court assoil-

zied him, with expences. (See ante, Vol. I, No. 500.) Montgomerie had been abroad during the proceedings, and the decree and letters of horning were issued in his name alone. A charge having been given by him, and in name of two mandatories, Campbell presented a bill of suspension, which the Lord Ordinary passed, without caution or consignation. In the meanwhile, Campbell entered an appeal to the House of Lords against the original judgment, and Montgomerie applied for interim execution. The Lord Ordinary reported the suspension, and the Court, in respect of the appeal, found it unnecessary to proceed farther in it, and allowed interim execution in common form.

Suspender's Authorities.—Pringle, June 16, 1738, (4643); Potter, July 25, 1739, (4644); O'Haggan, July 31, 1761, (Ib.); Irvine, June 1765, (4645, Mots); Hope, Feb. 8, 1780, (Ib.); Hope, June 10, 1797, (4646); Smith and Jameson, June 4, 1822, (ante, Vol. I, No. 583).

R. RATTRAY, W. S.—W. PATRICK, W. S.—Agents.

S. COULTER, Advocator.—*Greenshields.*
R. FORRESTER, Respondent.—*Moncreiff—M'Neill.*

No. 367.

June 11, 1823.

FIRST DIVISION.
Lord Alloway.
S.

Title to Pursue.—Coulter feued a piece of ground to the wife of Wark; but, as the price was not fully paid, he retained the titles. Wark afterwards executed a disposition omnium bonorum, under the act of grace, in favour of three creditors, as trustees, (of whom Forrester was one), 'and the survivor or sur-'vivors of them, the major part of the survivors being 'a quorum, in trust for behoof of themselves, and of 'my whole other just and lawful creditors.' These trustees raised against Coulter an action of exhibi-

tion and delivery, before the Magistrates of Glasgow, of the title-deeds in favour of Wark's wife, subject to payment of his claim, if he had any, and failing which, concluding for damages. After the process had depended for some time, Wark entered into a composition-contract with his creditors, and Coulter granted a disposition to Wark's wife, who conveyed the property and the title-deeds to a cautioner for the composition. Two of the trustees accepted of the composition, and disclaimed any farther proceedings in the action of exhibition. A question then arose, whether Forrester (who refused to accede) was entitled to insist in the action for his own behoof, to the effect of getting damages for the failure to exhibit the title-deeds. The Magistrates sustained his title, in respect that the other two trustees could not affect his rights as a creditor, or divest him of his interest in the trust created in his own person. But the Lord Ordinary, in an advocation, found, that although Forrester was not bound to accept of the composition taken by the other creditors, and was entitled to attach the subjects of his debtor, Wark, in any way competent by law, or to claim from Coulter any damages which he could qualify as having arisen from any improper conduct on his part, he could not, in his own name, prosecute the action which had been brought in name of the whole trustees, and for behoof of the whole creditors, after it had been disclaimed by them, or follow out the conclusion thereof; and, therefore, assoilzied Coulter, reserving to Forrester action in his own name. The Court adhered.

Respondent's Authorities.—2. Bell, 444; Scott, Feb. 16, 1822, (ante, Vol. I, No. 376).

W. Guthrie,—Todd & Wright, W. S.—Agents.

J. FREELAND and COMPANY, Pursuers.—*Bell*—*Jeffrey*—*Pyper*.
M. FINLAYSON and Others, Defenders.—*Clerk*—*Skene*—*Shaw*.

No. 368.

June 11, 1823.

SECOND DIVISION.
Lord Cringletie.
F.

Cautioner.—Wyllie, a bankrupt, offered to his creditors extrajudicially, a composition on his debts, to be paid by instalments, and to find caution for payment of the second instalment, on condition of all the creditors acceding to the composition-contract before the 22d December 1818. This having been accepted, Wyllie delivered two sets of bills, the first payable at six months, and the second at twelve months; and Finlayson and others, on the 4th of January 1819, granted a bond of caution for payment of the second set. This bond proceeded on the narrative, 'that all the creditors of the said A. Wyllie, with 'the exception after mentioned, have acceded to said 'proposal, and agreed to accept of said offered com-'position.' The exception was in the following terms. —'Declaring, that although the said deed of agree-'ment may not be actually subscribed by all the 'creditors of the said A. Wylie, particularly by the 'banking companies, who are not in use to sign pri-'vate deeds of composition, yet it is hereby express-'ly agreed to, that this circumstance shall not infringe 'or affect the obligation hereby come under by us in 'the premises.' Wyllie having failed to retire the first bills when they became due, a sequestration was awarded against him on one of those bills. Thereafter, an action was raised by Freeland and Company, creditors of Wyllie, against Finlayson, &c. (the cautioners), for payment of the second instalment bills held by

them. In defence, it was pleaded by the cautioners, that they were freed from their obligation, on the ground, 1. That the creditors had violated the composition-contract by doing diligence and obtaining sequestration on the first instalment bills, thereby carrying off the funds to which the cautioners looked for relief; and, 2. That it was a condition of the bond of caution, that all the creditors were to accede before the 22d December, whereas certain creditors had not acceded at all; others not till long after that day; and some only on a fraudulent stipulation with the bankrupt, that they were to obtain payment of their debts in full. It was answered, 1. That the delivery of bills implied a right to use diligence on them, when they were dishonoured; including, of course, sequestration; and that the creditors were not bound to delay doing so till the second set became due; and, 2. That the date of granting the bond of caution being posterior to the 22d of December, the accession of the creditors at that day could not possibly form a condition of the bond; that, besides, all the cases of non-accession fell within the exception; and that the pursuers could not be affected by the alleged fraud of third parties. The Lord Ordinary decerned in terms of the libel, refusing, as irrelevant, a condescendence of the alleged instances of non-accession, and pronouncing certain findings as to the ranking of the cautioners in the sequestration, after payment of the bills. The Court adhered; reserving, however, entire, all questions in the ranking.

Pursuer's Authority.—2. Bell, 598.

Defenders' Authorities.—University of Glasgow, Nov. 18, 1790, (Bell's Cases, 134); Paisley, Jan. 13, 1799, (8228); M'Laggan and Co., Sept. 19, 1813,

(F. C.); Taylor, Nov. 20, 1817, (not rep.); Houston, March 4, 1820, (F. C.); Fell, p. 91; 2. Bell, 596.

J. LANG, W. S.—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

Mrs. STRACHAN, Pursuer.—*Bell—Shaw.*
F. GRAHAM, Respondent.—*Solicitor-General Hope—More.*

No. 369.

June 12, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Usury—Mrs. Strachan having become bound, as cautioner for Gray, in a bond for £2,000 to Graham, ex facie for legal interest, raised an action of reduction of it, alleging that it formed part of an usurious contract, 'in as much as the defender, by letters and 'otherwise, stipulated with the said Charles Gray, that 'he should, for a loan, which the said Charles Gray, 'in his necessities required, to the extent of £3,000, 'or at least, of £2,000, not only give to the said de-'fender full security for the principal sum to be lent, 'but pay to him, in consideration of the loan so to 'be secured, interest after the rate of seven and a 'half per centum per annum: That to these terms 'the said Charles Gray, in his distress for want of 'money, was induced to accede, and accordingly

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Mrs. WALLACE and her SON, Petitioners.—

June 11, 1823.

SECOND DIVISION.

Poor's Roll.—In an application for the benefit of the Poor's Roll, at the instance of Mrs. Wallace and her Son, it appearing that the son was a clerk in a counting-house, having an income of about £30 yearly, the Court refused the application as to him. No papers.

'prevailed with the pursuer to become bound along 'with him in the bond above described, which was de- 'livered to the said defender for the purpose of secur- 'ing to him the repayment of the principal sum of 'money which he the defender agreed to lend, and 'forbear for and in consideration of the foresaid usuri- 'ous interest.' Against this action, after denying that there was any usurious contract, Graham pleaded, that the action was irrelevant, because, 1. Although this was a joint and several bond, yet it was not alleged, that usurious interest was stipulated from Mrs. Strachan, as well as from Gray; and, 2. That it was not averred that the bond had been delivered as a security for usurious interest. To this it was answered, 1. That it was stated that the contract was usurious, of which this bond formed a part; and, 2. That it was only necessary to aver, that the principal sum on which the usurious interest was to be paid, was secured, which was done. The Lord Ordinary reported the case, and the Court, at first, chiefly in respect of the defect of evidence, assoilzied the defender; but, on a petition and answers, and after ordering a condescendence, they remitted the case to the Jury Court.

Pursuer's Authorities.—(1.)—Floyer. Loft's Rep. 595; 1. Bell, 238, Note 3; Harrison, Taunt. 780; 1. Hume, 493.—(2.)—1. Hume, 493; 2. Jurid. Styles, 169; Comyns on Usury, 57.

Defender's Authorities.—1. Hume, 50 & 492.

J. F. Gordon, W. S.—Brown & Lawson, W. S.—Agents.

J. M'DONALD.—*Clerk—Jameson—J. Miller, Junior.* No. 370.
D. WALKER.—*Moncreiff—Henderson.*
Competing.

June 12, 1823.

FIRST DIVISION.
D.

Bankrupt—Sequestration—Competition for Trustee-ship.—D. Lindsay and Company having become embarrassed, executed a trust-deed, by which they conveyed all their effects to a private trustee, for the purpose of winding up the concern, and paying their debts. The trustee took possession; and, by the authority of the company, got a loan of £1,000 from Bruce, on the security of part of the effects, which was concluded by a written agreement. To the first deed there was no general accession by the creditors, and it was soon thereafter superseded by a sequestration. A competition then arose between M'Donald and Walker, for the office of trustee, the fate of which depended on Bruce's vote. To his vote Walker objected, 1. That he was not a creditor of the company, because it was dissolved, and divested by the trust-deed; that he had advanced the money to the private trustee; and that he was, therefore, a creditor, not of the company, but of the trust-estate; and, 2. That he ought to have produced with his affidavit the agreement between him and the private trustee relative to the loan. To this it was answered by M'Donald, 1. That the company existed to the effect of winding up; that the trust had been granted for that purpose, and for their behoof; and that the advance had been made by their sanction; and, 2. That the agreement was the voucher, not of Bruce, but of the private trustee, and was in his hands.

The Court, on advising a report, sustained the vote, and confirmed M'Donald, and thereafter adhered.*

M'Donald's Authorities.—(1.)—3. Ersk. Prin. 3, 8; Douglas, Heron, & Co., Dec. 24, 1795, (not rep.); No. 41, Ap. Cases in Ad. Lib. 1795–1796; 2. Bell, 589; Bell's Cases, 542; 2. Bell, 485.—(2.)—1. Bell, 395.
Walker's Authorities.—(1.)—Broughton, July 2, 1812, (F. C.); Bow, June 1, 1811, (F. C.)—(2.)—2. Bell, 372, 378.

D. Greig, W. S.—Ainslie & M'Allan, W. S.—Agents.

No. 371. Sir S. Stirling and Others.—*Moncreiff—Skene—Rutherford.*
Trustees on Berwickshire Roads.—*Cranstoun—Bruce.*
Competing.

June 12, 1823.

First Division. Lord Alloway. H.

Multiplepoinding, Competency of.—By the Berwickshire road act, it is enacted, that if any entailed lands be appropriated by the trustees, the value shall be consigned in the Bank of Scotland, to be employed for behoof of the heirs of entail, and the interest thereon shall be paid to the heir in possession, under the order of the Court of Session, issued in a summary process. Under this statute, an action was brought by Sir John Stirling, the heir in possession of the entailed estate of Renton, against the road-trustees, in which a sum was awarded, and ordered to be consigned. Pending the process, and before

* A point of form was decided in the above case. A petition by M'Donald was ordered to be seen and answered: Against this Walker reclaimed, on the ground, that as the petition had not been marked by the collector of the fee-fund, and by the clerk, within the reclaiming days, it was incompetent; but the Court repelled the objection as too late.

consignation, but after Sir John's death, an arrestment was executed against them by one of his creditors, and an assignation by another was intimated to them. They then brought a process of multiplepoinding, which was objected to as incompetent, in respect, 1. That the statute ordered the money to be disposed of in a particular manner, by a summary process; and, 2. That the money had been appointed to be consigned before the summons was called in Court. The Lord Ordinary sustained the process, because, 1. The interest was a fund attachable by the creditors of Sir John; and, 2. That the multiplepoinding was brought before consignation was made. Thereafter, the Court, in a separate process, found the arrestment inept, (see ante, Vol. II, No. 55), and the Lord Ordinary then dismissed the multiplepoinding as there were now no grounds for it, but found the trustees entitled to the expences of bringing it; and the Court adhered.

A. Pearson, W. S.—Renton & Grant, W. S.—Agents.

Major A. Forbes, Pursuer.—*Cockburn—Rutherfurd.* No. 372.
Dr. and Mrs. Forbes, Defenders.—*Cranstoun—Moncreiff—Skene.*

June 12, 1823.

First Division. Lord Alloway. D.

Passive Title—Vitious Intromission.—By an antenuptial-contract, executed in 1774, the late Mr. Forbes provided the fee of a salmon-fishing to the heirmale of the marriage, reserving his own liferent. He had two children,—the pursuer,—and Mrs. Forbes, the defender. In 1808, he succeeded to an entailed estate, out of which he was entitled to make a provision to his daughter, payable on his own death;

but, instead of that, he granted to her, in June of that year, a bond, payable in the event of the predecease of her brother, without issue. At the same time, he disponed to her the fee of the salmon-fishing, reserving his liferent. She was married, in April 1809, to Dr. Forbes, who at that time bound himself to pay to her father an annuity of £32, and, on the 18th of May, obliged himself to pay to him £300. On the 19th of May, Mr. Forbes executed a disposition to them of the fishing, both fee and liferent, bearing to be for love and favour, and containing a clause of absolute warrandice. They afterwards sold the fishing for £1,600.

The antenuptial-contract remained latent till 1819, when Mr. Forbes died. His son had, for ten years previously, been in possession of the manor-house and farm of Inverernan, without paying rent; and, on his father's death, he, without judicial authority, intromitted with his whole moveable estate, (of which he made up inventories), recovered and paid debts, and took the title-deeds into his custody. He afterwards brought an action against Dr. and Mrs. Forbes for the value of the fishing, alleging that, by the antenuptial-contract, a jus crediti to the fishing was created in his favour, and that the disposition to them was gratuitous. Against this action the defenders pleaded, 1. That the pursuer had incurred a passive title, by vitious intromission, in taking possession of the moveable estate;—gestione pro herede, by intermeddling with the title-deeds;—and preceptione hereditatis, by enjoying the manor-house and farm, without paying rent; and that he was, therefore, bound to implement the obligation of warrandice; and, 2. That the disposition was onerous,

having been executed in relation to the marriage, and that money considerations had been paid for it. To this the pursuer answered, 1. That he had not intromitted fraudulently, nor with an intention to represent, but only to pay off his father's debts; and, 2. That the narrative of the disposition showed it was for love and favour. The Lord Ordinary found, 1. 'That the pursuer, by representing his father, and 'by having intromitted with the whole of his move-'able estate, is bound by the absolute warrandice 'contained in his father's disposition of these fish-'ings;' and, 2. 'That, in the circumstances of this 'case, this may fairly be held to be an onerous 'deed, and which cannot now be challenged by the 'pursuer;' and, therefore, assoilzied the defenders. The Court adhered.

It was observed from the Chair, that the passive title of vitious intromission did not rest on fraud, but on the circumstance of possession being taken contrary to the due order of law.

Pursuer's Authorities.—(1.)—3. Bankt. 9, 3; 3. Erak. Prin. 9, 26; Black, Jan. 26, 1739, (9831); Wilson, June 19, 1772, (9833); Tawse, July 10, 1783, (9837); Gardner, Dec. 9, 1802, (9840).—(2.)—Riddell, Jan. 4, 1766, (13019); Speirs, July 28, 1778, (13026); Gordon, Dec. 8, 1790, (13028).

Defender's Authorities.—(1.)—Ritchie, March 7, 1795, (9838); Scott, May 25, 1821, (ante, Vol. I, No. 35); 2. Erak. 8, 33; 2. Bankt. 371; 3. Erak. 8, 90.

J. Morison, W. S.—Carnegy & Shepherd, W. S.—Agents.

No. 373. EARL of GALLOWAY, Suspender.—*Cuninghame.* REV. C. NICHOLSON, Charger.—*Sir J Connell—A. Connell.*

June 12, 1823.

SECOND DIVISION. Lord Pitmilly. M'K.

Grass Glebe.—The presbytery of Wigton having designated to the Rev. C. Nicholson, minister of the parish of Whithorn, a grass glebe of certain lands belonging to the Earl of Galloway, his Lordship suspended, on the ground, that the lands designated were friars and bishops lands, and that there being parsons and vicars lands in the parish, the presbytery were not entitled to designate the glebe out of the lands in question. For the minister, it was contended, that the act 1663, c. 21, establishing the right to grass glebes, did not lay down any order of church lands for their designation, as is provided by the statutes regarding arable glebes. The Lord Ordinary found, that the order of designation prescribed by the act 1593, c. 165, must be observed in designating a grass glebe as well as an arable glebe to a minister, and 'that the suspender's lands being friars and 'bishops lands, cannot be designed for a grass glebe 'while there are parsons and vicars lands in the 'parish,' and he appointed the suspender to state his averments as to the existence of such lands in the parish. The Court adhered.

Suspender's Authorities.—1593, c. 165; 1606, c. 7; Nairne, July 24, 1629, (5137); 3. Stair, 225; 2. Bank. 46.

Chargers' Authorities.—1649, c. 45; 1663, c. 21; 2. Erak. 10, 59; Durie, Dec. 12, 1755, (5161); Minister of Kingsbarns, June 10, 1794, (5140); and June 11, 1799, (Ap. Glebe, No. 2).

J. RUSSEL, W. S.—W. DICKSON, W. S.—Agents.

J. ANDREW, Pursuer.—*Clerk—Moncreiff—Skene.* No. 374.
AGNES MURDOCH, Representative of the late J. MURDOCH, Defender.—*Solicitor-General Hope—Maconochie—Dundas.*

June 12, 1823.

SECOND DIVISION.
Lord Pitmilly.
M.

Wrongous Imprisonment—Prescription—1701, c. 6.—In 1797, Andrew raised action of wrongous imprisonment against John Murdoch, then sheriff-substitute of Ayrshire, for having refused to admit him to bail, in terms of the provisions of the act 1701, c. 6, when imprisoned on a charge of sedition. The summons libelled solely on the statute, and concluded for the penalties awarded by it, and also for a certain sum in solatium. This Court having assoilzied the defender,* the cause was appealed, and by the House of Lords remitted back to the Court, June 29, 1814. After certain steps of procedure, it was allowed twice to fall asleep; and, when ultimately awakened in 1819, the defender pleaded, that the action had prescribed, in terms of the clause of the act 1701, which 'declares that action and 'process for wrongous imprisonment shall prescribe, 'if not pursued within three years after the last 'day of the wrongous imprisonment, and process 'being once raised, the same shall prescribe, if 'not insisted in yearly thereafter;' that this was a statutory offence; and that, as the action was founded on the statute alone, she must be assoilzied. For the pursuer, it was contended, that although the claim for the statutory penalties might have prescribed, yet the statute could not affect his claim of damages for wrongous imprisonment at common law. The Lord Ordinary reported the case, and the Court

* Andrew *v.* Murdoch, June 20, 1804, (F. C.)

found that the prescription applied, in respect that the action was rested on a breach of the act 1701.

The majority of the Court expressed an opinion that the refusal to accept bail not being an offence at common law, a conclusion for damages on that ground would have been unavailing. The other Judges considered this a point of difficulty.

Pursuer's Authority.—2. Hume, 180.
Defender's Authorities.—Sir James Dunbar, 1714, (in Court of Justiciary); Sinclair, July 1, 1742, (Elch. No. 7, v. Wrong. Impt.); Arbuckle, 1821.

GIBSON, CHRISTIE, & WARDLAW, W. S.—A. ROLLAND, W. S.—Agents.

W. DALRYMPLE.—*More.*
TRUSTEE on KEDSLIE'S Estate.—*Marshall.*

June 12, 1823.

FIRST DIVISION.

Sequestration—Expences.—Dalrymple, a creditor of Kedslie, by two bills, raised diligence on each of them, rendered him bankrupt, and obtained sequestration. The Court held, 1. That he was entitled to be preferred for the expence of making Kedslie legally bankrupt; but, 2. That as one diligence was sufficient for this purpose, he was to be allowed a preference for the expences of it only. No papers.

W. DALRYMPLE,—J. LYON,—Agents.

A. M'KENZIE and Others, Suspenders.—*Robertson—Menzies.*
DR. ROSS, Charger.—*Cockburn.*

No. 375.

June 13, 1823.

FIRST DIVISION.

Lord Meadowbank S.

Law-Agent's Lien—Compensation.—Dr. Ross brought a suspension of a charge on a bill, and an action of damages, against M'Kenzie and others. He obtained decree in the Jury Court for £150 of damages, and £350 of expences. In the suspension, the letters were found orderly proceeded, under deduction of these sums. His law-agent then gave notice that the expences were to be paid to him; and a charge was given for them in name of Dr. Ross. Of this, a suspension was brought by M'Kenzie and others, on the ground, that they were entitled to set off, against this claim, the balance of the bill found due to them, amounting to £249. But the Lord Ordinary repelled the reasons; and the Court adhered.

D. HORNE, W. S.—Æ. M'BEAN, W. S.—Agents.

CORPORATION of WEAVERS of AYR, Advocators.—*More.*
MRS. BONE and Others, Respondents.—*Greenshields.*

No. 376.

June 13, 1823.

FIRST DIVISION Bill-Chamber.

Lord Meadowbank. D.

Property-Tax—Repetition.—The Corporation of Weavers of Ayr, in 1810, sold a piece of ground to Mrs. Bone and others, who granted bond for part of the price, and for the interest. The interest was regularly paid till 1822, when the bond was discharged. The debtors, however, reserved a claim for property-tax, which they had not hitherto deducted from the interest. For this claim, they brought an action,

against which the Corporation pleaded, 1. That their funds were applied to the support of infirm members, and to the widows of those who had died, and, therefore, fell under the exemption relative to charitable institutions; and, 2. As the debtors had paid the interest without asking deduction of the tax, in the full knowledge of the whole circumstances, they were not entitled to repetition after so great a lapse of time. To this it was answered, 1. That the funds of the Corporation were not applied exclusively to charitable purposes; and, 2. That the tax having been paid on behalf of the Corporation, they were bound to repay it. The inferior court decerned for the amount; and the Lord Ordinary and the Court refused a bill of advocation.

Advocators' Authorities.—(2.)—1. Barn. & Ald. 123; 2. Mad. 163.
Respondents' Authorities.—Butcher, Dec. 16, 1814, (F. C.); Wilson, May 24, 1822, (ante, Vol. I, No. 487).

J. Robertson, W. S.—J. Gemmell,—Agents.

No. 377.

J. Dunlop, Advocator.—*D. M'Farlan.*
W. Harley and his Trustee, Respondents.—*Jameson.*

June 13, 1823.

Second Division. Bill-Chamber. Lord Pitmilly. F.

Process.—The Court refused, as incompetent, a petition against an interlocutor of the Lord Ordinary, of date 1st April, refusing a bill of advocation, in respect the interlocutor was final, the petition not having been lodged within four sederunt days after the meeting of the Court.

Greig & Peddie, W. S.—J. A. Campbell, W. S.—Agents.

Dr. F. HAMILTON, Pursuer.—*Moncreiff—White.*
J. CALDER, and Others, Defenders.—*Dickson—Jeffrey.*

No. 378.

June 13, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Teinds—Warrandice from Augmentations.—In the middle of the 17th century, Hamilton of Bardowie, the pursuer's ancestor, disponed in feu to one Donaldson, predecessor of the defenders, the lands of Birdiston, (situated in the parish of Campsie), with the teinds, for payment of a certain feu-duty, and a specified quantity of victual, at the rate of ten merks per boll, as teind-duty, which duty was about a fair rent for the teinds at the time. The disposition contained the following clause of warrandice relative to the teinds.—'And sicklike the said John Hamilton of 'Bardowie, be the tenor hereof, binds and obliges 'himself and his foresaids, to warrant, acquit, and 'defend the said James Donaldson and his foresaids, 'of all stents, taxations, and impositions whatever, 'as well not named as named, imposed or to be im-'posed upon the parsonage and vicarage-teinds of the 'said fourth part lands and possession, be any per-'son or person whatsomever at any time hereafter, 'and that at the hands of the minister of Campsie, 'present or to come, or any other having or pretend-'ing to have interest therein.' The minister of the parish having obtained an augmentation, part of which was allocated on the lands of Birdiston, Dr. Hamilton's predecessors paid it for some years; but in 1809, he raised action before the Sheriff of Stirling against the portioners of Birdiston, for arrears of teind-duties, alleging that they were liable for the augmented stipend payable to the minister,

over and above the duty stipulated in their feu-rights. The feuars pleaded, that the warrandice in their titles covered augmentations to the clergymen. The Sheriff sustained the defences, and found 'the 'defenders entitled to be relieved by the pursuer of 'the stipend allocated upon them.' Of this decree Dr. Hamilton brought the present action of reduction. The Lord Ordinary reduced in terms of the libel, and the Court adhered.

The Court were of opinion, that the rule was now completely established, that, unless augmentations were expressly mentioned in the clause of warrandice, they would not be covered by it, teinds being liable to augmentations ex sua natura; and it was observed, that the case of Lord Hopetoun, July 3, 1811, would not now be followed.

Pursuers' Authorities.—Colquhoun v. Smollett, Jan. 21, 1798, (not rep.); Plenderleath, Jan. 31, 1800, (16639); Alexander, June 9, 1812, (F. C.)
Defenders' Authority.—E. of Hopetoun, July 3, 1811, (F. C.)

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. LANG, W. S.—Agents.

No. 379.

R. ROBIN, Pursuer.—*Clerk—Forsyth.*
J. DRUMMOND, Trustee on D. M'FARLANE's sequestrated Estate, Defender—*Buchanan.*

June 13, 1823.

SECOND DIVISION. Lord Pitmilly. B.

Superior and Vassal—Non-Entry Duties.—Robin, superior of a small property, raised action of declarator of non-entry against M'Farlane and one Miller, who both pretended right as vassals, to the property in question. M'Farlane and his trustee stated their willingness to enter, as soon as their right to the subject was determined; but the Lord Ordinary, (Nov. 18th, 1817), in respect, that no person entitled to an

entry makes demand for such entry, decerned in the declarator. His Lordship's interlocutor having been reclaimed against, the Court superseded further consideration, till the question as to the right of property, between Miller and M'Farlane, then pending before the First Division, should be determined. This having been decided, (May 18, 1820), in favour of M'Farlane, the Court thereafter adhered to the Lord Ordinary's interlocutor, decerning in the non-entry. Drummond, (as M'Farlane's trustee), having now stated to the Lord Ordinary his willingness to take an entry, Robin insisted that he was entitled to the full rents of the subject since the date of citation. The Lord Ordinary found him 'entitled to the actual 'rents of the subjects, from the date of citation in 'the action of declarator;' but the Court altered his Lordship's interlocutor, and found Robin entitled only to the feu-duties.

Pursuer's Authorities.—2. Erak. 5, 29–40; Stair, ii, 4, 18; & iv, 8.
Defender's Authorities.—2. Erak. 5, 30, and Cases there referred to; 2. Stair, 4, 24.

D. FISHER,—T. MEGGET, W. S.—Agents.

T. SIMPSON, Advocator.—*Solicitor-General Hope—Walker.*
D. CREIGHTON, Respondent.—*Keay.*

No. 380.

June 13, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Mutual Contract.—By an agreement between Simpson, an outgoing, and Creighton, an incoming tenant, of a farm, the former bound himself to leave in grass certain specified parks, and 'about 23 acres' of another park, 'consisting altogether of about 97 'acres.' Creighton raised an action against Simpson,

before the Sheriff, for damages arising from a deficiency in the quantity of grass. The defence was, that although it had been discovered that the parks did not contain 97 acres, yet they had been left in grass; and that, at all events, there were 97 acres of grass on the farm. By the report of a surveyor, it was found, that the parks contained only 85 acres; that there were besides, (exclusive of grass under trees and natural grass), seven acres of grass on the farm, of inferior quality, which he estimated as equivalent to four acres, thus leaving a deficiency of eight acres. The Sheriff decerned against Simpson, at first, for the value of the eight acres; but thereafter altered, and held him liable for the deficiency in the parks. In an advocation, the Lord Ordinary remitted, to ascertain whether Simpson was, at the date of the agreement, aware that the parks did not contain ninety-seven acres; and the Sheriff, on advising a proof, adhered. The Lord Ordinary, in a second advocation, remitted simpliciter. But the Court held, that although not in perfect bona fide, Simpson was entitled to take into account the whole grass on the farm; that, in doing so, however, allowance was to be made for the inferiority in quality of any grass not in the parks; and that natural grass land, not in use to be ploughed, was not to be included; and they, therefore, altered the Lord Ordinary's interlocutor, and decerned in terms of that originally pronounced by the Sheriff.

Advocator's Authorities.—Roughead, Jan. 3, 1779; Gray, Jan. 23, 1801, (No. 2, Ap. Sale); Murray, Jan. 26, 1815, (F. C.)
Respondent's Authority.—Gordon, June 15, 1815, (F. C.)

BROWN & LAWSON, W. S.—R. SMYTH, W. S.—Agents.

J. GREGG and Others, Pursuers and Suspenders.—*Moncreiff—Cathcart.*
J. ANDERSON, Defender and Charger.—*Cranstoun—Gillies.*

No. 381.

June 14, 1823.

SECOND DIVISION.
Lord Pitmilly.
F.

This was a case of circumstances. Gregg, &c. brought a reduction and suspension of certain bills, as having been fraudulently granted, for the purpose of creating preferences on a bankrupt estate. The Court, being satisfied that the allegations of Gregg, &c. were not established by the proof, in the reduction, sustained the defences; and, in the suspension, found the letters orderly proceeded.

F. FRASER,—J. THORBURN,—Agents.

Mrs. CURRIE, Pursuer.—*Forsyth.*
A. COLQUHOUN, Defender.—*Baird—Gillies.*

No. 382.

June 17, 1823.

FIRST DIVISION.
Lord Alloway.
D.

Writer's Responsibility—Reparation.—Mrs. Currie, having agreed to sell a piece of ground to Miller, employed Colquhoun, a writer, to frame missives of sale, which he did, but failed to test them, in terms of law. An action of implement was brought against Miller, who defended himself, on the ground that the missives were not probative. Without abiding the issue of this process, Mrs. Currie instituted an action of relief against Colquhoun, who pleaded in defence, 1. That he had acted gratuitously as a friend, and not as an agent; and, 2. That a rei interventus had occurred, by which the bargain was completed independent of the missives. The Lord Ordinary, found, that, as he was entitled to make a charge

for framing the missives, it was his duty to render them effectual; and, therefore, that he was liable in relief, and the Court adhered.

Pursuer's Authorities.—Wood, Nov. 28, 1710, (13960); Robertson, July 27, 1725, (13963); Rae, July 29, 1741, (Ib.); Atkinson, Dec. 3, 1756, (13965); Goldie, Jan. 4, 1757, (Ib.); Mason, Feb. 14, 1767, (13967); Lillie, Dec. 13, 1816, (F. C.); Duncan, July 3, 1817, (F. C.)

W. WILLIAMSON,—C. STEWART,—Agents.

No. 383. MISS CARNEGY, Pursuer.—*Jameson.*
EARL of NORTHESK and Others, Defenders.—*Alison.*

June 17, 1823.
FIRST DIVISION.
Lord Alloway.
D.

Trust.—In this case, which related to the construction of a trust-deed, the points were, 1. Whether a certain annuity to the pursuer was payable out of the trust-funds generally, or out of the interest of a capital sum set aside to be paid to her on majority or marriage; and, 2. Whether there were sufficient funds to pay the annuity, and discharge the other purposes of the trust. The Lord Ordinary and the Court held, that it was due out of the trust-estate generally, and that there was no evidence of a deficiency of funds; and, therefore, decerned against the defenders.

M'MILLAN & GRANT, W. S.—J. YULE, W. S.—Agents.

No, 384. J. REID, Pursuer.—*D. Dickson—J. W. Dickson.*
R. HOPE and Others, Defenders.—*Irving.*

June 17, 1823.
FIRST DIVISION.
Lord Alloway.
H.

Legacy—Compensation.—The late Mr. Hope bequeathed £600 to Reid, for which he raised an action against the executors. They pleaded in defence,

compensation to the extent of £557, being a debt due to the testator, in evidence of which, they referred to a document signed by Reid, and maintained, that it was the intention of the testator, that this debt should be set off against the legacy. Reid denied that he was debtor; and although he admitted his signature, alleged that the document was not intended as a voucher of debt, and that it was not probative, being neither holograph, nor tested in terms of law. The Lord Ordinary decerned for the legacy, and the Court at first adhered; but, on a farther production of documents, and report of an accountant, being satisfied that Reid was indebted to the testator at his death, to the amount of the legacy, their Lordships altered, and assoilzied the defenders.

R. Henderson,—J. Irvine, W. S.—Agents.

The Rev. G. Gardiner, Pursuer.—*Sir J. Connell.*
J. Dingwall, Defender.—*Maconochie*

No. 385.

June 17, 1823.

Second Division.
Lord Cringletie.
F.

Manse Rent.—The Rev. G. Gardiner having been presented to the parish of Aberdour in 1810, agreed to accept of £14 annually, in name of manse rent, for the period of five years thereafter, the manse being ruinous and uninhabitable. In 1814, he obtained a judgment of the presbytery against the heritors for the erection of a new manse. This judgment was suspended by Dingwall, the principal heritor, on grounds which were ultimately repelled in this Court, (July 9, 1815), and in the House of Lords, (March 2, 1821). Pending the litigation, the minister was obliged to take a house, for which he paid £21

yearly. Having raised this action against Dingwall, concluding for payment of manse rent, the Lord Ordinary found him entitled to only £14 annually, in terms of his former agreement with the heritors. But the Court altered his Lordship's interlocutor, and awarded £21, as the sum actually paid by him for a residence, since the expiry of the agreement.

Pursuer's Authority.—Steele, Jan. 31, 1712, (5131).

J. MURRAY, W. S.—A. CAMPBELL, W. S.—Agents.

No. 386.

Mrs. M'LEOD, Suspender.—*Lumsden.*
CAPT. M'LEOD, Charger,—*J. M'Donald.*

June 19, 1823.

FIRST DIVISION. Lord Alloway. D.

Reference to Oath.—In this case no general point occurred. The Lord Ordinary, on a reference to oath, confined it to two particular points, which exhausted the case, and refused a more general investigation. The Court adhered.

C. M'DONALD, W. S.—S. F. MACKINTOSH, W. S.—Agents.

No. 387.

Sir M. MALCOLM, Pursuer.—*Jeffrey—Fullerton.*
H. BARDNER, Defender.—*Cranstoun—Moncreiff—Robertson.*

June 19, 1823.

SECOND DIVISION. Lord Cringletie. B.

Tailzie—Lease—Homologation.—The late Sir James Malcolm possessed the estate of Grainge under a strict entail, which prohibited the heirs from 'disponing' or doing 'any other deed which may 'anyways hinder the next heir of tailzie from up-'lifting the full rents, mails, farms, profits, and du-'ties of the same, to the extent of the present rental

'thereof.' In 1801, in consideration of a grassum, he let to Bardner a part of the entailed estate for forty years. Sir Michael Malcolm, having succeeded to the estate in 1816, he, in 1819, raised an action to have Bardner's lease reduced, as in contravention of the entail. Bardner admitted, that a lease for forty years was struck at by the prohibition to 'dispone,' but pleaded in defence, 1. Homologation on the part of Sir Michael, in having received the rents payable under the lease, and in having allowed him to expend considerable sums in improvements on the farms, for three years after his succession, without challenge; and, 2. That, at all events, the lease must be considered in a question with Sir Michael, as of the date of his succession, at which period there were only twenty-four years to run, which did not exceed the period of ordinary duration; and that the clause in this entail was not similar to that in the Queensberry case, where the taking of grassums had been held illegal. Sir Michael answered, 1. That accepting rents payable under a deed which afforded a good title of possession till reduced, could not infer homologation, and that he had warned the defender of his intention to challenge the lease, by inserting in his receipt for the rents, a reservation to that effect; and, 2. That even although twenty-four years were a period of ordinary duration, (which was disputed), yet the lease being in itself null and ultra vires of the granter, it was impossible to alter its terms so as to form a valid lease; and, besides, that any lease granted in consideration of a grassum, was in effect an alienation. The Lord Ordinary having first reduced the lease, thereafter reported the case, when the Court sustained the reasons of reduction.

Pursuer's Authorities.—Stirling v. Dun, Feb. 3, 1821; Stirling v. Walker, Feb. 3, 1821; E. of Wemyss, Nov. 29, 1815, (F. C.); E. of Wemyss, Nov. 17, 1815, (F. C.)

Defender's Authorities.—Foulyes, Dec. 14, 1748, (5709); Big, Dec. 17, 1776, (5672).

MARTIN & STEVENSON, W. S.—J. S. ROBERTSON, W. S.—Agents.

No. 388.

J. HAIG, Advocator.—*Shaw.*
J. BUCHANAN, Respondent.—*More.*

June 20, 1823.

SECOND DIVISION. Bill-Chamber. Lord Mackenzie. F.

Retention—Process—Summary Imprisonment.—Haig drew a bill on Anderson, who accepted it; and, at Haig's request, applied to Buchanan to discount it. The bill was accordingly presented to Buchanan, who claimed a right to retain it in security of a debt due to him by Anderson. Haig then applied by a summary petition to the Sheriff of Lanarkshire, praying for restitution of the bill, and for warrant of imprisonment in case of refusal. The Sheriff, holding a summary process incompetent, dismissed the action. On a bill of advocation being presented, Buchanan returned the bill, and the Lord Ordinary remitted, with instructions to recal the interlocutor, and to find Buchanan liable in all expences, except so far as regarded the conclusion for imprisonment; but his Lordship said nothing as to the expences in the Bill-Chamber. The Court granted these expences, and adhered quoad ultra.

The Judges were of opinion, that the conclusion for warrant of imprisonment was incompetent.

Respondent's Authority.—Murray, May 15, 1810, (F. C.)

C. FISHER,—G. COMBE,—Agents.

S. COLLIER, Suspender.—*Cheape.* No. 389.
J. and J. DAWSON and COMPANY, Chargers.—*Gillies.*

Bill of Exchange.—This was a suspension of a promissory-note for £46: 5s., granted by one Fisher; and was a question of fact, relating to the due intimation of the dishonour of the bill. The Lord Ordinary and the Court found the regular intimation proved, and repelled the reasons.

June 20, 1823.
SECOND DIVISION.
Lord Pitmilly.
F.

J. CAMERON,—J. THORBURN,—Agents.

J. WILKIE, Suspender.—*More.* No. 390.
M. M'CULLOCH and COMPANY, Chargers.—*Clerk*—*Jardine.*

Exclusive Privilege.—Wilkie invented a new species of plough, which was commonly called by his name, but he had no right of patent to the invention. M'Culloch and Company, without his authority, manufactured plough boards, on which they stamped 'Wilkie,' and latterly 'Wilkie's newest pattern.'

June 21, 1823.
FIRST DIVISION.
Lord Meadowbank.
D.

Against

CHISHOLM, Pursuer.—*J. M'Donald.*
His CREDITORS, Defenders.—

Cessio Bonorum.—The Court refused to ordain part of an Exciseman's salary to be assigned to his creditors, in respect that it was admitted to be the uniform custom of the Board of Excise to dismiss all officers, if part of their salary was attached. No papers.

June 21, 1823.
SECOND DIVISION.

Against this Wilkie presented a bill of suspension and interdict, on the ground, that although he had not the exclusive privilege of making and vending these improved ploughs, yet he was entitled, at common law, to prevent any one from impressing his name on those which were not made by him, or under his authority. To this it was answered, that his name had been stamped, not to convey to the public the idea that the ploughs were manufactured by him, but only to distinguish them as belonging to a peculiar class. The Lord Ordinary interdicted 'M'Culloch and 'Company from impressing the complainer's name 'or mark used on the ploughs or plough boards made 'under his inspection or his authority, upon ploughs 'or plough boards not manufactured by him, or with 'his leave.' A petition having been presented, the Court, before answer, allowed a minute to be put in by M'Culloch and Company, of an averment, that they stamped their own name, along with that of Wilkie, on the ploughs; but it being afterwards admitted, that this was not done till posterior to the suspension, their Lordships adhered.

G. Combe, W. S.—J. Forman, W. S.—Agents.

No. 391.

Mrs. Reid.—*Forsyth*—*Sandford*.
Reid's Trustees.—*Brown*.
Competing.

June 21, 1823.

First Division. Lord Meadowbank. D.

Competition.—After a process of declarator of marriage and aliment had been raised at the instance of Mrs. Reid, against G. Reid, he disponed his heritable estate to trustees. Part of the estate having been sold by the trustees, and Mrs. Reid having been

finally declared the wife of Mr. Reid, she arrested the price in the hands of the purchaser. A multiplepoinding was brought by him, in which the only competing parties were the trustees and Mrs. Reid. She alleged that the trust-deed was collusive, and claimed to be preferred, but the Lord Ordinary preferred the trustees. The Court adhered, in respect that another process of multiplepoinding had been raised, calling into the field all Mr. Reid's onerous creditors.

D. Fisher,—J. Brodie, W. S.—Agents.

H. Bremner, Suspender.—*Currie.*
J. Durran, Charger.—*Boswell.*

No. 392.

June 21, 1823.

Second Division.
Bill-Chamber.
Lord Cringletie.

Process.—Durran, having expede letters of suspension of a charge at Bremner's instance, obtained a decree in absence, 'suspending the letters simplici-'ter,' and for expences. On this decree Durran charged Bremner, who presented a bill of suspension, which was passed by the Lord Ordinary, 'in respect 'it is admitted, that the charge never was produced, 'in spite of which the respondent took a decree, sus-'pending the letters simpliciter, and finding the 'charger liable in expences, for payment of which 'the charge now complained of was given, which 'decree was irregular and incompetent.' Durran reclaimed, but the Court adhered, in respect that it would be open to discuss the merits of the decree on the passed bill.

W. Ritchie,—D. Clyne,—Agents.

No. 393. A. WALLACE and Others, Suspenders.—*Alison.*
C. FERRIER, Trustee on the Estate of the PATENT SCOTCH COOPERAGE Co., Charger.—*Blackwell.*

June 21, 1823.

SECOND DIVISION. Bill-Chamber. Lord Mackenzie.

This was a suspension of a charge, proceeding on the decree pronounced in the case, ante, Vol. II, No. 262, in so far as it charged Wallace, &c. to consign the interest of the price in dispute, no mention of the interest being made in the interlocutor. The bill was reported by the Lord Ordinary, and the Court being satisfied that the interest, as well as the principal, was meant to be consigned, refused the same.

J. G HOPKIRK, W. S.—J. SWAN, W. S.—Agents.

No. 394. P. M'ARTHUR, Advocator.—*Moncreiff—Cockburn.*
J. PHILIP and A. DUNBAR, Respondents.—*Clerk—Gibson Craig.*

June 21, 1823.

SECOND DIVISION. Bill-Chamber. Lord Craigie. B.

Procurator before Sheriff-Courts.—M'Arthur was duly admitted a procurator before the Sheriff-Court of Nairn, but he did not reside within the county. Shortly after his admission, the Sheriff, on the application of Philip and Dunbar, two resident procurators, ordained it 'to be made a rule of Court, that 'no person who does not reside within the county 'of Nairn shall be admitted to practice as an agent 'before the Court;' and, on a second application at their instance, he pronounced a judgment, wherein he found, 'that great inconvenience, as well as injury, 'may arise to the lieges, from having agents prac-'tising in this Court, while resident in another 'county, therefore, prohibits and discharges the clerk

'of Court, from calling or receiving any action 'in the name of any agent, not resident in the 'county, or from delivering processes to be sent out 'of the county, without an order from the Supreme 'Court.'—Of this judgment, M'Arthur presented a bill of advocation, and the Court, on report of the Lord Ordinary, remitted to the Sheriff to recal his judgment, reserving to him to make such regulations as may seem proper to remedy the inconvenience arising from the non-residence of the practitioners.

The Court, while they were satisfied that the Sheriff had exceeded his powers, expressed an opinion, that he might insist on the practitioners having a place of business within the county, and a person residing there, who should be responsible for processes borrowed.

Advocator's Authority.—Jamie, &c. July 6, 1813, (F. C.)
Respondents' Authorities.—1. Erak. 2, 8; Kames, Tr. 2, p. 6.

R. M'KENZIE, W. S.—J. GORDON, W. S.—Agents.

J. GLASFORD, Complainer.—*Fergusson—Cranstoun—Jameson.*
Æ. MORRISON, Respondent.—*Clerk—Moncreiff.*

No. 395.

June 24, 1823.

FIRST DIVISION.
H.

Pactum de Quota Litis.—During the dependence of an action at the instance of certain creditors of the late Henry Glasford, for attaching the entailed estate of Douglaston, his brother, Mr. J. Glasford, the heir in possession, presented a complaint to the Court, stating, that the creditors and Mr. Æ. Morrison, their agent in Glasgow, had entered into a written agreement, of the nature of a pactum de quota litis, by

which they had obliged themselves, if the action were successful, to pay to Mr. Morrison, besides his usual charges, a high per centage on the amount recovered,—that Mr. Morrison was a member of the College of Justice,—and, therefore, this agreement was illegal, and ought to be reduced, and such further steps adopted as should appear to be just. Against this action Mr. Morrison pleaded, 1. That it was incompetent; for, although he had been, for a few years, an advocate's first clerk, he had long since resigned that office, and was not a member of the College of Justice; and, 2. That it was unfounded; because, although the creditors had, at a meeting, entered into an agreement, without his knowledge, (which they afterwards communicated to him in a letter), that considering, that if the action should terminate favourably, they must attribute their success to him, they had resolved to allow him a commission, at the rate of five per cent on the sums they might draw from the estate, besides his ordinary charges, yet this was an act entirely gratuitous on the part of the creditors, to which he was no party. The Court dismissed the complaint, and found Mr. Morrison entitled to expences.

Complainer's Authorities.—1. St. 10, 8; 1. Bankt. 11, 11; A. S. July 23, 1774; 1594, c. 216.

Respondent's Authority.—Mack. Obs. 289.

J. G. Hopkirk, W. S.—Gibson, Christie, & Wardlaw, W. S.—Agents.

JAS. KERR, Trustee for Creditors of T. Meek, deceased, Pursuer.—*Moncreiff—Sandford.*
W. and A. COOPER and COMPANY, and Others, Defenders.—*Jeffrey—M'Gachen.*

No. 396.

June 24, 1823.

SECOND DIVISION.
Lord Glenlee.
B.

Relief.—Meek, procurator-fiscal of the justice of peace court of Lanarkshire, at the instigation of Cooper and Company, and others, thread-makers in Glasgow, lodged informations against Mitchell and Company, and Harper, as having sold certain kinds of thread, contrary to the provisions of 28. Geo. III, cap. 17, and caused 30 lbs. of the thread to be seized. The penalties under the act were from £5 to £10 per lb. of thread seized, and were payable to the informer. After a litigation in the justice of peace court, where Meek failed to get the thread condemned, he advocated the cause, when Mitchell and Harper were assoilzied, with expences. Kerr, trustee for the creditors of Meek, (now deceased), pursued Cooper and Company, and the other thread-makers, for the expences of this prosecution, and for relief of the damages incurred in a subsequent action at the instance of Mitchell and Harper, on the ground, that the prosecution was for their behoof and that they had subscribed an agreement, binding themselves 'to be at the expence of a legal trial of 'the question.' It was pleaded in defence, that the prosecution was, at least, partly for Meek's behoof, and that he, as informer, would have drawn the penalties had the thread been condemned; and for certain of the defenders, that they had withdrawn from the action. The Lord Ordinary reported the case, and the Court being satisfied that Meek was merely

a nominal pursuer, found all the defenders liable in relief, up to such period as they could instruct a disclamation of the action.

D. Fisher,—Campbell & Mack, W. S.—Agents.

No. 397.

Officers of State, Pursuers.—*Alison.*
Earl of Haddington, Defender.—*Clerk—Cranstoun—Jameson.*

June 24, 1823.

Second Division. Lord Pitmilly. M'K.

Prescription—King's Park.—The office of keeper of the Royal Park of Holyroodhouse was, by charter, in favour of Sir James Hamilton, in 1646 created an heritable office, to which an ancestor of Lord Haddington, afterwards acquired right, and received a new charter in 1691, which granted, 'totum et integrum hereditarium officium, et custodium, roborarii nostri, lie park de Holyroodhouse, cum omnibus redditibus, proficuis, divoriis, viridariis, feodis, casualitatibus, privilegiis, et emolumentis quibuscunque ad idem spectan. et pertinen.;' and in the enumeration in the tenendas of this charter were included 'in lapicidiis, lapide et calce' 'cum omnibus et singulis aliis libertatibus, &c. ad predict. hæreditarium officium, cum proficuis, divoriis, &c. quibuscunque spectan.' Prior to the erection of the hereditary office, stones had been quarried in the park; but it did not appear that any profit or emolument had been derived from this source, either by the crown or the temporary keepers of the park. Subsequent to the grant, and for more than forty years, the quarries of Whinstone had been worked by the keeper, and let on lease for a considerable rent; and, latterly, since 1814, the working of the quarries in the

rock of Salisbury Craigs, had removed about 36,000 tons a-year. In 1819, the Officers of State raised the present action, to have it declared, that Lord Haddington had no feudal property in the park; and that, as keeper, he had no right to work minerals in it. The Lord Ordinary found, 'that, with reference 'to the usage anterior to the grant, the terms of the 'conveyance import a right in the grantees, of work-'ing the quarries in question; and this, independently 'of the clause in the tenendas, which, although it 'makes reference to the minerals, would not be ef-'fectual to convey any subject which was not either 'in express terms, or by legal construction, carried by 'the dispositive clause. That the construction now 'put on the terms of the grant is confirmed by the 'usage that has taken place since its date. And se-'paratim, that such being the import of the grant, 'the defender's right to the quarries is established 'by the positive prescription;' and, on these grounds, his Lordship sustained the defences, and assoilzied Lord Haddington. The Court, while they found, that Lord Haddington had no feudal right in the park, adhered, quoad ultra, (by a majority), to the Lord Ordinary's interlocutor 'in hoc statu, in respect 'no abuse is alleged hitherto to have been commit-'ted.'

Pursuers' Authorities.—2. Ersk. 3, 23; 2. Ersk. 9, 57; 2. Stair, 6, 4; 2. Stair, 3, 23; Lord Aboyne, Nov. 16, 1614, (F. C.); Forbes, Jan. 31, 1822, (ante, Vol. I, No. 322).

Defender's Authorities.—King's Advocate, Feb. 1686, (10776); Lord Kinnet, March 1, 1769, (10781).

F. Wilson, W. S.—J. Hope, W. S.—Agents.

No. 398. A. P. ROBERTSON, Pursuer.—*Moncreiff—More.*
J. GILLESPIE, Defender.—*Cockburn—A. M'Neill.*

June 25, 1823.

FIRST DIVISION. Lord Alloway. H.

Sale.—Gillespie, having bound himself by missives, to purchase a piece of ground belonging to W. and R. Robertsons and Company, an action of implement was brought by the pursuer, as in right of the Company. The defence was, that the price had not been finally arranged,—that the pursuer's titles were not complete,—that the defender had acted in the purchase merely as agent for other parties, and that the action ought to be sisted, till the issue of a process of relief, at his instance, against these parties. But the Lord Ordinary being satisfied that the defences were unfounded, decerned against him, and the Court adhered.

J. ROBERTSON, W. S.—G. DUNLOP, W. S.—Agents.

No. 399. J. RAMSDEN, Suspender.—*A. M'Neill.*
SMITH, HAYWOOD, & Co. Chargers.—*Forsyth.*

June 25, 1823.

FIRST DIVISION. Bill-Chamber. Lord Mackenzie. S.

Jurisdiction.—This was a suspension of a charge on certain bills, on the grounds, 1. That it was unauthorized; and, 2. That the suspender was an Englishman, who had no domicile in this country. The Lord Ordinary refused the bill, in respect of no caution; but the Court, on an offer of caution, passed it.

C. FISHER,—D. FISHER.—Agents.

J. HAMILTON, Suspender.—*D. M'Farlan.*
N. FERGUSSON, Charger.—*Cuninghame.*

No. 400.

June 25, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Relief.—Fergusson got an assignation to a landlord's hypothec, on granting his bill for the rent and expences, and he thereafter permitted Hamilton, a creditor of the tenant, to sell off the effects, on condition of relieving him of his obligation; Hamilton caused a third party to take up the bill, to whom Fergusson paid it, and then brought an action for payment of the contents, and obtained decree against Hamilton. He suspended; but the Lord Ordinary and the Court found the letters orderly proceeded.

J. SMYTH, W. S.—A. P. HENDERSON,—Agents.

J. HADDEN, Junior, Pursuer.—*Forsyth—Jeffrey.*
W. PIRIE & Co., Defenders.—*Cranstoun—Fullerton—Skene.*

No. 401.

June 25, 1823.

SECOND DIVISION.
Lord Cringletie.
F.

Patent.—This was an action at the instance of Hadden, against Pirie and Company, for invasion of a patent obtained by him, for an improvement in 'preparing, roving, and spinning wool,' of which the specification was as follows, 'my said improvement doth 'consist in preparing wool, (by which technical expression, I mean to imply drawing wool after it has 'been carded, combed, or otherwise brought into a 'fit state for drawing;) as also, to rove and spin all, or 'either the same, while in a heated state; various methods may be found for applying heat to wool, during 'all, or either of the three said processes of preparing, 'roving, and spinning; that which I have adopted,

'and which I have found the most easily and perfectly to procure the advantages desired, has been the introduction of cast-iron heaters into the retaining rollers, used in the said processes, by always using three of the said rollers, and by leading the wool over half the circumference of each of the two upper of the said heated rollers, thereby allowing it to pass over a sufficient length of heated suface, to become thoroughly warmed, without retarding the other processes it is undergoing at the time.' The invasion complained of was, that Pirie and Company had heated the rollers, by introducing into them a stream of heated air, instead of iron-heaters, whereby they prepared their wool, 'while in a heated state,' contrary to the patentee's privilege. In defence, it was pleaded, 1. That the patent for preparing wool, 'while in a heated state,' was a patent for a principle, and therefore null; and that the specification was not sufficiently explicit; 2. That it was not a new invention; and, 3. That it had not been infringed by the operations of the defenders. The Lord Ordinary repelled the first defence, and the Court adhered to his Lordship's interlocutor, 'which repels the defences, in so far as founded on the patent being granted for a principle; and also adhered to the said interlocutor, repelling the defence founded on the alleged insufficiency of the specification, in so far as appears on the face of the specification itself.'

Pursuer's Authorities.—Davies on Patents, p. 416, 426; Forsyth v. Manton, 1819, (King's Bench); Hall v. Boot, Dec. 17, 1822, (King's Bench).

Defenders' Authorities.—Davies, p. 434, 440, 197; The King v. Wheeler, 2. Barn. & Ald. 345.

DALLAS & INNES, W. S.—CAMPBELL & ARNOTT, W. S.—Agents.

J. KIRKWOOD, Pursuer.—*Macfarlane.*
A. WILSON, Defender.—*Shaw.*

No. 402.

June 26, 1823.

FIRST DIVISION.
Lord Alloway.
D.

Reference to Oath—Principal and Agent.—Kirkwood raised action against Wilson, alleging that he had been employed by the latter to build a house at an agreed-on estimate of £550, and that a balance of £64 was still due. In defence, Wilson stated, that the contract had been made with Kirkwood's son, as agent for his father, at an estimate of £450, and that it had been fully paid. But a jury having found that the contract was for £550, Wilson proposed to refer to the oath of Kirkwood's son, that, in truth, the bargain was £450; and contended, that it was competent to make such a reference, where a contract had been made by means of an agent. The Lord Ordinary found, 'that, although it is competent, after a 'cause has been finally decided, even by a verdict in 'the Jury Court, to refer the whole cause to the 'oath of party, any reference is quite incompetent 'which is offered to be made, not to the party himself in the cause, but to a person whom it was 'competent for the party making the reference to 'examine as a witness in the proof which was led: 'that John Kirkwood, senior, is the only pursuer in 'this cause, and has always denied that his son, John 'Kirkwood, junior, was his partner in business: that 'the contrary allegation can now be proved only by 'a reference to the oath of John Kirkwood, senior, 'the only party: that it was perfectly competent for 'the defender to examine John Kirkwood, junior, 'before the jury, as a witness, if he had thought fit; 'and that he had, accordingly, cited him as a wit-

'ness: therefore, found the proposed reference to 'the oath of John Kirkwood, junior, incompetent.' The Court adhered.

Pursuer's Authorities.—L. Renton, July 7, 1632, (6787); Heriot, 1613, (5850); Ker, Jan. 20, 1636; L. Pitfoddels, Feb. 15, 1662, (12454); Buchan, Jan. 2, 1787, (11128).

Defender's Authorities.—4. Taunt. 511; Paley, 207, (Note to Gow's Ed.); 19. Vesey, 123; Paley, 208 & 211; 5. Esp. 145; 3. Bankt. 2, 83; 4. Ersk. 2, 10; Hepburn, Dec. 12, 1661, (12480); Johnstone, Jan. 13, 1766, (12480); Arnot, March 6, 1611, (12477); Campbell, July 25, 1766, (12481); Barclay, March 6, 1630, (12479); Cochran, July 22, 1760, (6018); Paterson, Jan. 23, 1771, (12485); Young, Trotter, and Co., Dec. 2, 1802, (12486).

G. MACDOWALL,—TOD & WRIGHT,—Agents.

No. 403. D. FARQUHARSON, Petitioner.—*Solicitor-General Hope—Cullen.*

A. MIDDLETON, Respondent.—*J. Henderson, Junior.*

June 26, 1823.

FIRST DIVISION. D.

Bankrupt—Discharge.—Farquharson, a sequestrated bankrupt, having, with concurrence of the trustee, applied for a discharge; it was opposed by Middleton, on the ground, that there was not the requisite concourse. But the Court being satisfied that the objection was unfounded, granted the discharge.

A. ROBERTSON,—J. BURNESS,—Agents.

No. 404. J. LEARMONTH and Co., Pursuers.—*Moncreiff—Burn Murdoch.*

J. F. ERSKINE, Defender.—*Clerk—Rollo.*

June 26, 1823.

FIRST DIVISION. Lord Meadowbank. H.

Attested Account—Acquiescence.—Learmonth and Company raised an action against Mr. Erskine, founding on certain accounts which they had regularly rendered to him at the end of each year, and which

he had attested, and re-delivered to them. In defence, he denied his liability for several articles contained in the accounts; but the Lord Ordinary decerned against him, 'in respect that the accounts 'libelled were not only regularly furnished to the 'defender at the end of each year, without any ob- 'jection being made to the said accounts, or to any 'articles thereof, but also, that the said accounts 'were regularly certified by the defender to be cor- 'rect;' and the Court adhered.

W. Robertson, W. S.—Gibson, Christie, & Wardlaw, W. S.—Agents.

J. Fraser, Suspender.—*Cockburn—Cuninghame.*
Sir W. C. Fairlie, Charger.—*Greenshields.*

No. 405.

June 26, 1823.

First Division. Lord Meadowbank S.

Process—A. S. March 11, 1820.—Fraser expede letters of suspension and liberation against Sir W. C. Fairlie, in which the day of appearance was Tuesday the 13th of May 1823. By the A. S. March 11, 1820, all summonses, suspensions, &c. are ordered to be called on Friday of each week, by being entered in a list; and it was, therefore, impossible to call this suspension until the 16th. A protestation was, however, put up by Sir W. C. Fairlie on the 15th, but it could not be read in the minute-book till the 20th. The suspension was regularly called on the 16th, and no appearance having been made, Fraser enrolled it before Lord Meadowbank. Sir W. C. Fairlie objected to this enrolment, and insisted that it should be struck out, in respect of his subsisting protestation, which, he alleged, entitled him to take the lead in the process. The Lord Ordinary having

reported the case, the Court repelled the objection, found the procedure regular, and remitted to his Lordship to proceed accordingly.

Suspender's Authority.—Shiells against Bayne, Dec. 18, 1788, (not rep.)
Charger's Authorities.—Spottiswoode's Form of Pro. 18, 25, 186; 1. Ivory, 185, 264.

GREIG & PEDDIE, W. S.—J. GEMMEL,—Agents.

No. 406.

J. WILSON, Pursuer.—*Skene—Cuninghame.*
J. HENDERSON, Defender, et e contra.—*Cranstoun—Matheson.*

June 26, 1823.

SECOND DIVISION. Lord Cringletie. F.

Missive of Tack.—During the currency of a life-rent lease held by Wilson, Mr. Henderson, the proprietor, granted to him a missive letter, binding himself, in respect 'you have instantly offered me £35 'sterling money,' to renew the tack at the first term of Whitsunday after its expiration, in favour of Wilson's son. Henderson having died, his heir and representative, immediately on the death of Wilson, raised action of removing against his son, who, on the other hand, brought an action of implement of the missive. In defence against implement, it was alleged, that the missive was not obligatory, there having been no express acceptance. In the removing, caution for violent profits, was demanded, on the ground, that there was no title of possession; to which, it was objected, that the missive was a prorogation of the tack, and that it was, therefore, of no importance that a new tack was not to be granted till the first Whitsunday after the last tenant's death. The Lord Ordinary ordered caution to be found, and, in respect of a failure to do so, decerned in the re-

moving. His Lordship also decerned for implement. The Court recalled the decree of removing, and adhered quoad ultra.

Wilson's Authorities.—3. Ersk. 2, 2, & 3, 26, 45; Brown, Feb. 2, 1822, (ante, Vol. I, No. 325).
Henderson's Authorities.—2. Stair, 9, 45; 4. Ersk. 6, 51; Fergusson, Nov. 23, 1748, (8440); Fulton, Feb. 26, 1761, (8446).

J. J. Fraser, W. S.—J. Gordon, W. S.—Agents.

J. Carstairs and Others, Pursuers.—*Jameson.*
W. Gulland and Others, Defenders.—*Fullerton.*

No. 407.

June 26, 1823.

Second Division. Lord Cringletie. B.

Process.—The Lord Ordinary having, of date December 5, 1822, assoilzied the defenders in this action, a pro forma representation was lodged on the 24th December, which was refused 14th January thereafter. A full representation was then given in, of date February 3, which did not recite the interlocutor of January 14, refusing the short representation, but simply represented against the interlocutor of December 5. The Lord Ordinary, 'in respect the 'interlocutor complained of appears to be final, re-'fused the representation as incompetent.' But the Court recalled his Lordship's interlocutor, and remitted to hear on the merits.

The Court held, that if the interlocutor complained of had truly been kept open by representations, it was not essentially necessary to recite the intervening interlocutor of refusal.

Tod & Wright, W. S.—Hotchkis & Meiklejohn, W. S.—Agents.

No. 408. WILSON and M'LELLAN, *Moncreiff—Ivory*, B. FLEMING.—*Jeffrey—Jameson.* Competing.

June 26, 1823.

SECOND DIVISION. Lord Cringletie. B.

Competition of Executor-Creditor with Arrester.—Fleming and Wilson and M'Lellan were creditors of Carruthers. Wilson and M'Lellan, prior to Carruthers's death, used arrestments of funds belonging to him; and, immediately after his death, Fleming confirmed these funds as executor-creditor. In a multiplepoinding, Wilson and M'Lellan on the one hand, and Fleming on the other, claimed to be preferred to the fund in medio, in virtue of their respective diligences. The Lord Ordinary reported the case. Wilson and M'Lellan contended, that an executor-creditor took the funds of the deceased cum sua causa, as they stood in his person; while Fleming maintained, that confirmation qua executor-creditor, was a diligence which removed the debt confirmed out of the funds of the deceased, and being a completed diligence, was preferable to an arrestment, which, till decreet of forthcoming, is merely inchoate. The Court found, that 'confirmation by an executor 'qua creditor is preferable to an arrestment by an-'other, although used before the confirmation was 'expede;' and remitted to the Lord Ordinary to proceed accordingly.

The Court held the decision in the case of Carmichael referred to by Fleming to be correct in principle.

Wilson and M'Lellan's Authorities.—3. Ersk. 6, 11, 17; 3. Bankt. 1, 49; Riddel, Jan. 21, 1681, (2790); Hume, Feb. 1688, (2790); Crawford, July 20,

1732, (2791); Kames Elucidations, p. 110; 3. Stair, 1, 38; Stevenson, Nov. 12, 1680, (5405); Muirhead, Feb. 17, 1735, (687).
Fleming's Authorities.—3. Stair, 1, 37; 3. Ersk. 6; & 3. 34; Lee, May 17, 1816, (F. C.); Carmichael, June 22, 1742, (2791).*

GIBSON, CHRISTIE, & WARDLAW, W. S.—G. M'DOWALL,—Agents.

A. EDWARD, Advocator.—*Lumsden—Neaves.*
W. FYFE, Respondent.—*Skene.*

No. 409.

June 26, 1823.

SECOND DIVISION. Lord Pitmilly. F.

Chirographum apud debitorem repertum.—Fyfe raised action before the Sheriff of Aberdeen against Edward, for delivery of a bill, which had some time previously been granted to him by Edward. This bill, it was proved, had been abstracted from the possession of a messenger, in whose hands it was placed by Fife; and it was found in Edward's possession, without any receipt, discharge, indorsement, or conveyance whatever. The Sheriff decerned against Edward, who advocated, and pleaded the maxim, 'chirographum apud debitorem repertum præsumitur solutum; but having given an account of the manner in which the bill came into his possession, which was proved to be false, the Court held this sufficient, in a case where there was no receipt, to elide the usual presumption of law, and adhered to the Lord Ordinary's interlocutor, which remitted simpliciter to the Sheriff.

S. F. M'INTOSH, W. S.—J. M'COOK, W. S.—Agents.

* One of their Lordships stated, that Lord Kilkerran was mistaken in saying that the Court decided this case without hearing parties on this point, as he possessed the papers, which fully argued the question involved in the present case.

No. 410. G. CONDIE, Pursuer.—*Clerk—Jeffrey—More.*
D. BUCHAN and Others, Defenders.—*Cranstoun—L'Amy—Fullerton.*

June 26, 1823.

SECOND DIVISION. Lord Pitmilly. B.

Writ.—This was an action of reduction of two deeds of trust and settlement, in favour of the defenders, D. Buchan, and Others, which bore to be executed by the late James Buchan, senior, Mrs. Buchan, his wife, and his son, James Buchan, junior, also now deceased. The deeds had been drawn by Condie, the pursuer, a writer, as the agent of the parties; and he afterwards acquired right to the subjects thereby conveyed. The ground of reduction was, that the deeds had not been duly tested, as the witnesses neither saw Mrs. Buchan and her son subscribe, nor heard them acknowledge their subscriptions. The Lord Ordinary allowed a proof, from which it appeared, that Condie had sent his son with the deeds to the house of Mr. Buchan, senior, to get them executed; that the instrumentary witnesses were taken into the bed-room of Buchan, senior, and there heard him acknowledge his subscription,—that they then went into another room, where they signed their names as witnesses,—that Mrs. Buchan, her son, and young Condie were then present; but one of the witnesses deponed, that he neither saw these two parties subscribe, nor heard them acknowledge their subscriptions,—and the other witness deponed, that he did not remember their signing or acknowledging, in his presence, 'and, he thinks 'he can say decidedly,' that they did not. It further appeared, that young Condie carried back the deeds to his father, the pursuer, who immediately

filled up the testing clause of one of the deeds, from his son's information, and that the other deed was filled up by young Condie himself. These clauses stated, that the deeds had been executed, 'in presence' of the two witnesses. The Lord Ordinary found, that the 'pursuer has failed to establish, by satisfactory e-'vidence, the reason of reduction,' and the Court, after giving a contrary judgment, ultimately, by a majority, adhered.

The majority of the Court considered, that great weight was to be given to the real evidence arising from the statement in the testing clauses, as they had been filled up, de recenti, and from the knowledge of a person who was present.

Pursuer's Authority.—Stevenson, Nov. 1682, (16886).
Defenders' Authorities.—Young and Denholm, Aug. 2, 1770, (16905); Sibbald, Jan. 18, 1776, (16906); Frank, March 3, 1795, (16824).

W. & A. G. Ellis, W. S.—J. & W. Jollie, W. S.—Agents.

Dunlop and Cullen, Pursuers.—*A. M'Neill.*
W. Jeffray, Defender.—*J. Wilson, Junior.*

No. 411.

June 27, 1823.

First Division.
Lord Meadowbank.

Sequestration—Interim Factor.—Dunlop and Cullen, agents in the sequestration of J. Reddie's estate, pursued Jeffray, the trustee, for payment of their accounts; and also, as assignees of the interim-factor, for £5 : 5s. as his fee. Jeffray consigned a sum of money as the debt due to the pursuers, but disputed the liability of the estate, for the fee claimed on behalf of the interim-factor. The Lord Ordinary decerned for the consigned sum, but found, 'that no 'factor's fee having been fixed at the meeting of the 'creditors of James Reddie, none is due ex lege to

'the interim-factor,' and assoilzied quoad ultra. The Court refused a petition.

W. Guthrie,—W. Mercer, W. S.—Agents.

No. 412. W. Bayne, Pursuer.—*Clerk—M'Farlane.*
J. Fair, Defender.—*Baird—Small Keir.*

June 27, 1823.
First Division.
Lord Hermand.
H.

Expences.—This was a question of expences, arising out of processes of count and reckoning, and of multiplepoinding, which had depended upwards of twenty years in Court. The Lord Ordinary found Bayne liable for them; but the Court altered, and decerned against Fair.

Tod & Wright, W. S.—J. Young, W. S.—Agents.

No. 413. Margaret Morrison, Pursuer.—*Jeffrey—Buchanan.*
R. B. Allardyce, Defender.—*Solicitor-General Hope—Skene—H. J. Robertson.*

June 27, 1823.
First Division.
Lord Meadowbank.
H.

Master and Servant—Local Usage—Morrison raised an action before the Sheriff of Kincardineshire, alleging, that she had been hired by Allardyce, as a cook-maid, from Whitsunday till Martinmas 1821,—that she had entered to, and continued in his service till Martinmas, when she was paid her wages, and dismissed without any previous warning; and concluded for wages and board-wages for the ensuing half-year. In defence, Allardyce admitted, that no notice had been given; but stated, that by local usage, warning was not necessary, where the parties meant to terminate their contract at the agreed-on

term, and that it was perfectly understood, that if a servant was not 'spoken to,' she was to depart at the expiration of the engagment. The Sheriff allowed a proof of the defence, and, chiefly on the ground of the local usage, assoilzied Allardyce. But the Lord Ordinary, in an advocation, decerned against him, in respect 'that the pursuer, being a domestic 'servant, engaged from one term to another, ought 'to have received due and legal notice of the intention of the defender to dispense with her services at 'the term at which she was dismissed,' and the Court adhered.

It was observed on the Bench, that a defence of local usage, in order to be available, must be proved to be uniform, and notorious, which was not the case here.

Pursuer's Authorities.—S. Ersk. 3, 16; 2. Hutch. 151; Baird, July 14, 1779, (9182); M'Lean, Feb. 4, 1813, (F. C.)
Defender's Authorities.—Bells, June 14, 1814, (F. C.); Tait's J. P. 320.

G. Hogarth, W. S.—W. Duthie, W. S.—Agents.

W. and A. Scott, Advocators.—*Grahame Bell.*
T. Haliburton, Respondent.—*Bruce.*

No. 414

June 27, 1823.

Second Division.
Bill-Chamber.
Lord Kinedder.
M'K.

Fiar and Liferenter—Process—50. Geo. III, c. 112.—William Scott was liferenter, and Andrew Scott, his son, fiar of certain burgage-tenements. The former became bankrupt in 1796, and executed a disposition omnium bonorum, for behoof of his creditors, in favour of Haliburton, who entered into possession of the houses, and continued to possess them till 1821. Scott and his son then raised an action against him, before the Sheriff, concluding for

count and reckoning, for repair of the subjects, and damages. After a report by tradesmen, the Sheriff found a sum due, which he ordered to be consigned for behoof of all concerned, but that it could not be uplifted by the Scotts, and applied to repairs without the consent of their creditors; and he, thereafter, refused to grant an interim-decree for a sum to make the repairs. A bill of advocation was presented, with the leave of the Sheriff, which was objected to as incompetent, because the act 50. Geo. III, c. 112, only allows advocation where an interim-decree has been granted, but not where it has been refused. The Lord Ordinary repelled the objection, and remitted to the Sheriff, to find that Haliburton 'having entered into possession of the subjects in the right and under the obligations of the liferenter, was bound to possess the said subjects salva substantia, and to execute such repairs as were necessary to preserve them in a habitable and tenantable condition;' 'that Andrew Scott is a just and lawful creditor' of Haliburton, to the extent of the sums necessary for the repairs of the houses, and to ordain the latter to consign such sum as shall be requisite for that purpose. The Court adhered, with the farther instruction, that the Sheriff should hear parties on objections to the tradesmen's reports, and, if necessary, allow a proof of the state of disrepair.

Advocators' Authorities.—2. Erak. 9, 57, 60; Laird of Cadell, Jan. 23, 1635, (8271).

Respondent's Authorities.—1594, c. 226; 2. Erak. 9, 60.

W. Martin,—Tait & Bruce, W. S.—Agents.

EARL of BREADALBANE and Another, Pursuers.—*Jardine.*
J. J. M'LACHLAN and Others, Defenders.—*Murray—Henderson—J. M'Donald.*

No. 415.

June 27, 1823.

SECOND DIVISION.
Lord Cringletie.
F.

Expences.—In an action of reduction, and of count and reckoning, raised in 1779, the pursuers, Lord Breadalbane and another, obtained a final decreet of reduction, by judgment of the Inner-House, in 1802, on petition and answers, which, however, contained no finding as to expences. In 1822, Lord Breadalbane, &c. claimed expences from the Lord Ordinary, who refused them, on the ground, that it was an established rule, that no expences should be given where the Court had decided a leading point of the cause, on petition and answers, without any finding as to expences. Lord Breadalbane, &c. reclaimed; but M'Lachlan, &c. at the bar, waved this question, and the Court being satisfied, that, on the merits, no expences were due, adhered, on that ground, to the Lord Ordinary's interlocutor.

H. DAVIDSON, W. S.—COLL. M'DONALD, W. S.—R. M'KENZIE, W. S.—J. SMAIL, W. S.—Agents.

OFFICERS of STATE, Pursuers and Chargers.—*Solicitor-General Hope—Blair—Dundas.*
J. OUCHTERLONY, Defender and Suspender.—*Cockburn—Rutherfurd—Campbell.*

No. 416.

June 27, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

Sepulchre.—In 1752, a charter was granted by the crown to the Magistrates of Aberbrothwick, of the orchard and yard of the abbey of Aberbroth-

wick, which, along with the abbey itself, had been retained by the crown, when the rest of the abbacy was erected into a temporal lordship at the reformation. In 1771, the Magistrates gave to the father of Ouchterlony, a disposition of part of the surface, within the walls of the abbey itself, (which formed no part of the crown grant to them); but no infeftment was ever taken. By the accumulation of soil and rubbish, the original floor of the building was covered to the depth of several feet; and several of the Ouchterlony family had been buried in it since the date of the disposition. The Officers of the Crown having proposed to remove this soil, and clear the ruins, they communicated to Ouchterlony their willingness to raise the bodies, and re-inter them under the floor, in the manner the least offensive to his feelings; and to allow him to retain there the same extent of burying ground as that which he had formerly enjoyed. This offer was refused; and Ouchterlony presented a bill of suspension and interdict, on the ground, 1. That the crown had no title to the abbey, as it was included within the temporal lordship held of the crown by the family of Panmure; and, 2. That by possession for forty years, he had acquired a prescriptive right of sepulchre there. The Officers of State thereupon raised an action of declarator of the exclusive right of the crown, and of removing. The Lord Ordinary repelled the reasons of suspension, and decerned in the removing, 'in 'respect, 1. That there is a radical title in the crown 'to the abbey of Aberbrothwick; 2. That the only 'title which the Magistrates of Aberbrothwick have 'to any part of the precincts or grounds attached to 'that building, is by grant from the crown; 3. That

'the only right which the defender has, is by grant 'from the said Magistrates, and that the subject 'of the grant is within the nave of the abbey, which 'was not conveyed to them; and which, of course, 'they had no right to convey to the defender; 4. 'That the defender cannot plead prescription, ow- 'ing to his having no infeftment; and, lastly, that 'the burial place claimed by him is no part of a 'church-yard, and it is even said by the pursuers, 'that the defender is not an heritor in the parish of 'Aberbrothwick: That the Officers of the Crown are 'entitled to inquire into the extent of the grant by 'the crown; and that the defender, whose only title 'is dependent on that grant, is not entitled to found 'on the right of Mr. Maule, from whom he derives 'no right.'' The Court adhered to the Lord Ordi- 'nary's interlocutor.

Although the Court were quite satisfied as to the right of the crown, and the want of right on the part of Ouchterlony, they were still of opinion, that the Officers of State were bound to take those precautions as to the remains already interred, which had been originally offered to Mr. Ouchterlony.

F. Wilson, W. S.—A. Pearson, W. S.—Agents.

F. M'Gill, Suspender.—*Marshall.*
A. Rowand, Charger.—*A. Dunlop, Junior.*

No. 417.

June 28, 1823.

First Division.
Bill-Chamber.
Lord Mackenzie.

M'Gill having been charged on his promissory-note, which was indorsed to Rowand, presented a bill of suspension, and referred to Rowand's oath, whether he was an onerous indorsee. The Lord D.

Ordinary and the Court found the oath affirmative, and refused the bill.

R. W. NIVEN, W. S.—W. PATRICK, W. S.—Agents.

No. 418.

A. CAMPBELL, Suspender.—*Cockburn—Sandford.*
J. MILL, Charger.—*Hutcheson—Moncreiff.*

June 28, 1823.

FIRST DIVISION.
Lord Meadowbank.
D.

Jurisdiction—Process—25. Geo. III, c. 51—48. Geo. III, c. 98.—Mill, farmer of the post-horse duties for Scotland, laid an information under the 25. Geo. III, c. 51, and 48. Geo. III, c. 98, accusing Campbell of having let, in Edinburgh, a saddle-horse to hire, for a certain distance, without complying with the requisites of the statutes, and concluding for £10 of penalty. On considering a proof, a justice of the peace for the county of Edinburgh awarded a conviction. By the former of these statutes, it is enacted, that if any person shall consider himself aggrieved by the sentence of a justice of the peace, he 'shall and may, upon giving security, &c. appeal to 'the justices at the next general quarter sessions, 'who are hereby empowered to summon, and ex-'amine witnesses on oath, and finally hear and de-'termine the same.' Without appealing to the quarter sessions, Campbell suspended, alleging that the justice had exceeded his powers, by applying the statutes to saddle-horses, although they related only to post-horses; and that the fact of hiring by distance had not been proved. Mill at first objected to the competency, on the ground, that this was a revenue question, in which the Exchequer had an exclusive jurisdiction; but the Lord Ordinary and the Court repelled that objection. Thereafter, founding on the above clause, he objected, that the

case ought to have been appealed to the quarter sessions. The Lord Ordinary suspended the letters on the merits; but the Court found 'it incompetent, under the enactments of the statute of the 25th 'of his late Majesty, Geo. III, c. 51, to review the 'sentence pronounced by the justices of the peace 'in this case;' and, therefore, altered, and found the letters orderly proceeded, but no expences due.

Suspender's Authorities.—Buchanan, March 10, 1754, (7347); Guthrie, Dec. 10, 1807, (No. 17, Ap. Jurisd.); Dawson, Feb. 13, 1809, (F. C.); I. Ersk. 3, 20; Findlater, March 2, 1812, (not rep.)

J. TAYLOR,—S. C. SOMMERVILLE, W. S.—Agents.

G. R. SCOTT and Others, Advocators.—*Skene—H. J. Robertson.*
J. ROBB, Respondent.—*Solicitor-General Hope—Whigham.*

No. 419.

June 28, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord Mackenzie.
H.

Edinburgh.—The only question here was, whether Robb was entitled to build a house in Cumberland Street, Edinburgh, according to a contract in 1806, or was bound to observe certain articles of roup executed in 1810. The dean of guild having granted him a warrant, in terms of the deed 1806, Scott and others presented a bill of advocation, which the Lord Ordinary passed; but the Court altered, and refused the bill.

G. VEITCH, W. S.—T. WALKER,—Agents.

No. 420. DUKE of ATHOLL and Others, Complainers.—*Moncreiff—Jardine.*
W. DALGLEISH and Others, Respondents.—*Clerk—Keay.*

June 28, 1823.
SECOND DIVISION.
F.

Breach of Interdict—Stake-Nets.—After a long litigation between the complainers and the respondents, relative to the stake-net fishings in the river Tay, the Court, on the 8th July and 21st November 1817, granted an interdict against fishing by stake-nets, within the frith, or river Tay, which, they found, extended to Drumley Sands. The Duke of Atholl, &c. having complained that Dalgleish, &c. had erected stake-nets within the frith, in breach of this interdict, the Court remitted to Mr. Jardine, civil engineer, to report as to the situation of the nets complained of, and being satisfied by his report, that the nets were within the frith, but that the breach of interdict had not been wilful on the part of Dalgleish, &c. they ordained the nets to be removed, and assoilzied quoad ultra.

A. CAMPBELL, W. S.—J. HERIOT, W. S.—Agents.

No. 421. D. SUTHERLAND, Suspender.—*Menzies.*
J. MORRISON, Charger.—*Jeffrey—More.*

July 1, 1823.
FIRST DIVISION.
Lord Meadowbank.
S.

Bill of Exchange—Vitiation.—Sutherland suspended a charge on his accepted bill in favour of Morrison, on the ground, that the date was vitiated, by being altered from the 14th to the 24th January 1822. To this it was answered, that the alteration had been made at the request of Sutherland himself, before he

accepted the bill. The Lord Ordinary suspended the letters, 'in respect that the alteration made in 'the date of the bill is an alteration in substantiali-'bus, and is not one of immaterial description, and 'if sanctioned by courts of law, would inevitably lead 'to fraud both upon the revenue and individuals.' But the Court being satisfied from the evidence, that Morrison's statement was correct, altered, and found the letters orderly proceeded.

Suspender's Authorities.—Grahame, Jan. 17, 1795, (1453); Murchie, July 17, 1796, (1456); Bryce, Nov. 16, 1810, (F. C.); Callendar, Dec. 10, 1812, (F. C.); Chitty, 133; Henderson, Feb. 20, 1802, (7039).

Charger's Authorities.—1. Bell, 304-305; Chitty, 130; Bayley, 89; 1. Starkie, 452; 2. Starkie, 45; Henderson, Feb. 20, 1802, (17059); Fairweather, Feb. 12, 1817, (F. C.)

J. CAMERON,—FALCONER & JOHNSTON,—Agents.

No. 422

EARL of ROSEBERRY, Pursuer.—*Clerk—Murray.*
J. MACQUEEN and T. COWIE, Defenders.—*Solicitor-General Hope—More.*

July 1, 1823.

FIRST DIVISION. Lords Kinedder and Mackenzie. S.

Fraud—Trust—Husband and Wife.—Cowie, proprietor of a tenement affording a rent of about £80, granted an irrevocable disposition of it, on the 19th of June 1819, to trustees, on the narrative that he was solvent, and had made no provision for his wife and children. The purposes were, 1. To pay to himself an annuity of £5; 2. To pay the balance of the rents to his wife, for behoof of his children, and exclusive of his jus mariti; and, 3. To dispone the subjects after his death to his children, whom failing, to his own heirs or assignees. Sasine was taken and recorded on the 1st of July 1819. One of the trustees did not accept; Cowie remained with his wife

and family in possession; his wife drew the rents; and he had no other means of subsistence. In September he contracted a debt to Lord Roseberry, who, after having incarcerated him, and been obliged to aliment him under the act of grace, brought a reduction of the trust-deed and sasine, on the ground, 1. That they were intended as a fraudulent device to screen his property from the payment of his lawful debts; and, 2. That having been granted without any onerous cause or antecedent obligation, they were revocable. In defence, it was pleaded, 1. That the deed was effectual, having been executed when Cowie was solvent; 2. That the publication of the sasine notified to all the world the transfer of the property; and, 3. That the disposition was an onerous and valid deed. The Lord Ordinary assoilzied the defenders; but the Court, on advising a condescendence, altered and reduced quoad the rents.

Pursuer's Authorities.—(1.)—4. Erak. 1, 44, and case there; Reid, Jan. 9, 1673, (4923); St. p. 118, 591, 735, 29.—(2.)—Stewart, Feb. 1686, (6096); M'Lellan, Dec. 22, 1758, (6098); Stewart, Nov. 22, 1769, (6100); Watson, June 17, 1774, (6103); Sanders, Feb. 1, 1728, (6108); Scott, April 21, 1777, as rev. in H. of L. (6108).

Defenders' Authority.—Seton, March 6, 1793, (4219).

J. & W. Ferrier, W. S.—Campbell & Arnot, W. S.—Agents.

No. 423.

A. Roger, Advocator.—*Skene.*
Jean Cooper, Respondent.—*Maidment.*

July 1, 1823.

Second Division. Lord Cringletie. F.

Defamation—Reference to Oath.—Cooper pursued Roger before the Commissary of Aberdeen, for defamation, concluding for a palinode, damages, and fine, to the procurator-fiscal. The Commissary having allowed a proof, granted the palinode, and found Roger liable in damages. In an advoca-

tion, the Lord Ordinary, being satisfied that there was no proof of the slander, remitted to the Commissary to assoilzie Roger, and find him entitled to expences. Cooper reclaimed, and offered to refer the libel to Roger's oath. But the Court, considering that such an oath would be obliging the party to swear in suam turpitudinem, refused the reference, and adhered to the Lord Ordinary's interlocutor.

The Court strongly reprobated the practice of concluding for and granting a palinode in cases of this description.

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. J. FRASER, W. S.—Agents.

J. ALISON, Advocator.—*Solicitor-General Hope—Baird.*
J. DURIE and Spouse, Respondent.—*Jeffrey—G. G. Bell.*

No. 424.

July 1, 1823.

SECOND DIVISION. Lord Cringletie. M'K.

This was a case of circumstances. It related to the right of Alison to build his wall in contact with that of Durie's house. The latter having applied for an interdict, the inferior court, on a proof, pronounced a judgment, of which both parties complained by advocations. The Lord Ordinary and the Court being satisfied that Durie had no servitude over the ground on which Alison was building, and had judicially abandoned his right of eave's-drop, assoilzied Alison, and dismissed the advocation at the instance of Durie.

G. NAPIER,—T. JOHNSTONE,—Agents.

No. 425. **W. Fleming and J. Leiper, Suspenders.**—*Blackwell—A. Wood.*

J. Scott, Cashier of the Paisley Union Bank, Charger.—*Moncreiff—Jameson.*

July 1, 1823.

Second Division. Lord Cringletie. F.

Bill of Exchange—Vitiation—Stamp-Act.—Fleming and Leiper accepted a bill in favour of Young, to which he had not adhibited his name as drawer. In this state it was deposited with Hamilton, who was Young's law-agent, and was also bank-agent for the Paisley Union Bank. Hamilton filled in his own name as drawer, and indorsed the bill to the bank. When it was about to fall due, the bank reindorsed it to Hamilton, in order to recover payment. On receiving it, Hamilton deleted his own name as drawer, and caused Young, (who had been in the meanwhile sequestrated) to subscribe in that character, and also as first indorser on the bill. Fleming and Leiper having been charged to pay the bill, suspended, on the ground, 1. Of vitiation; and, 2. Of the stamp-acts. On report of the Lord Ordinary, the Court suspended the letters simpliciter, reserving all claims of right to be heard in a multiplepoinding, which had been reported along with the suspension, and which the Court remitted to the Lord Ordinary.

The Court considered that the bill was rendered null as a document of debt, both at common law and on the stamp-acts; and that, therefore, the charge could not be turned into a libel.

Suspenders' Authorities.—31. Geo. III, c. 34; 48. Geo. III, c. 149; 1. Anne, c. 22; Bowman v. Nichols, 4. T. R. 537; Bathe v. Taylor, 15. East. 412; Calvert v. Roberts, 3. Camp. 343; Kuill v. Williams, 10. East. 441; Onthwaite v. Hannly, Chitty, p. 134; Master v. Miller, 4. T. R. 320; Murchie, July 1, 1796, (1458); Bryce, Nov. 16, 1810, (F. C.); Callender, Dec. 10, 1812, (F. C.)

Charger's Authorities.—Chitty, p. 101-302; Kershaw v. Cox, 3. Esp. 246; Webber v. Maddocks, 1. Chitty, p. 202; Mill, Jan. 16, 1810, (F. C.); Fairweather, Feb. 12, 1817, (F. C.); Low, June 1820.

A. Fleming, W. S.—J. Smyth, W. S.—Agents.

J. Kerr, Pursuer.—*Gillies.* No. 426.
J. Scott, Defender.—*Matheson.*

July 3, 1823.

First Division.
Lord Alloway.
H.

Compensation.—This was a special case. Kerr raised action, as surviving partner of certain companies, for two accounts due to them, and as assignee of Handyside, one of the partners, for another account. Scott's defence was a plea of compensation against Handyside, which he endeavoured to extend against the other two accounts, alleging that they were truly claims by Handyside. The Lord Ordinary sustained the compensation as to Handyside's account, but repelled it quoad ultra, and the Court adhered.

H. G. Dickson, W. S.—W. Clark, W. S.—Agents.

Stephenson's Trustees, Petitioners.—*Cuninghame—Cathcart.* No. 427.
Marquis of Tweeddale, Respondent.—*Clerk—Murray.*

July 3, 1823.

First Division.
S.

Execution Pending Appeal.—In an action at the instance of Stephenson's trustees, (see ante, Vol. II, Nos. 173, and 264), the Lord Ordinary had found 'the pursuers entitled to the £100 a year, payable 'to W. Stephenson, out of the surplus rents of 'Snawdon, from the date of the assignation to the 'Marquis of Tweeddale and his factor, and decerns;'

and thereafter, in reference to a letter of intimation, his Lordship 'found, that in virtue of this intimation, 'the pursuers are entitled to draw the surplus rent of '£100 per annum, since 1813, when the transaction 'was carried into effect, and with this explanation, 'adheres to the interlocutor complained of.' The Court, (by a majority), adhered simpliciter; and the Marquis having appealed, Stephenson's trustees prayed for interim execution for £1,235 : 15s., which they alleged was the amount of the arrears of £100 per annum, with interest since 1813. To this it was objected, that there was no decree for any specific sum; and that, therefore, interim execution was incompetent. The Court refused the prayer.

J. Tweeddie, W. S.—Gibson, Christie, & Wardlaw, W. S.—Agents.

No. 428. W. Cockburn, Advocator.—*Cockburn—Pringle.*
Trustees of the late Captain J. Cockburn, Respondents.—*Forsyth.*

July 3, 1823.

Second Division. Bill-Chamber. Lord Mackenzie. B.

Donation.—The late Captain Cockburn was, at the period of his death, on terms with an officer on half-pay, for an exchange, at the regulation price. The Commander in Chief allowed it to take place, for behoof of Captain Cockburn's 'family,' which consisted of a brother and several sisters. Captain Cockburn had, by a settlement, conveyed all his property to trustees, who claimed the price. The brother insisted that it had never been in bonis of the deceased; that it was a donation to his relations, by the Commander in Chief; and raised action to have it found, that he had right to a share. The inferior

court assoilzied; but the Court, on report of the Lord Ordinary, passed a bill of advocation.

T. Baillie,—J. Gibson, Junior, W. S.—Agents.

A. Garden, Trustee on the Sequestrated Estate of A. G. Thomson, Pursuer.—*Jameson.*
F. Cameron and Others, Defenders.—*Moncreiff—Ivory.*

No. 429.

July 8, 1823.

Second Division. Lord Cringletie. F.

Sequestration—Title to Pursue.—Thomson, a partner of Cameron, Thomson, and Company, having been sequestrated, a majority of his creditors resolved to accept a certain sum from the defenders, the other partners, as Thomson's share in the concern; and further resolved, 'that the Trustee be prohibited incurring any expence in prosecuting the 'claims against Cameron, Thomson, and Company, 'chargeable on the trust-funds.' The minority of the creditors having complained, the Court found, that the first resolution was unwarranted, and that the second should be sustained to 'this extent only, 'that no part of the expence of the action, in name 'of the trustee, against Cameron, Thomson, and 'Company, shall be defrayed out of that portion of 'the trust-funds which may belong to the creditors concurring in the resolutions, unless they shall 'avail themselves of a decree in such action.' The trustee having instituted an action for the claims in question, the defenders pleaded, that in consequence of the judgment of the Court, the trustee had no title to pursue, at least as trustee, or for more than for a share of the claim effeiring to the proportion of the debts, for which the minority of Thomson's creditors,

who did not concur in the resolutions, were ranked. The Lord Ordinary sustained the title of the trustee, and the Court adhered.

G. NAPIER,—GIBSON, CHRISTIE, & WARDLAW, W. S.—Agents.

No. 430. JOHN ROBERTSON, Trustee on the Sequestrated Estate of JOHN RAE, Complainer.—*Jeffrey—Lumsden.* BANK of SCOTLAND, Respondents.—*Cockburn—Walker.*

July 3, 1823.

SECOND DIVISION. Lord Kinedder. B.

Sequestration—Ranking.—Wilson and Ritchie accepted a bill for £1,000 in favour of Rae, payable on 5th September 1820. Rae indorsed it for value to the Bank of Scotland. Wilson became bankrupt, and his estate was sequestrated in March 1820. On the 27th of that month, and on 1st June, Rae made partial payments of the bill to the extent of £600, and his estate, also, was soon afterwards sequestrated. The Bank, on the 27th January 1821, lodged a claim on Wilson's estate for £1,000, being the full amount of the bill. Rae's trustee likewise entered a claim for £600, and insisted, that the ranking of the Bank should be limited to £400. The trustee on Wilson's estate rejected the claim by Rae's trustee, and sustained that by the Bank. Against this judgment, Rae's trustee presented a complaint, which the Lord Ordinary reported on informations. Rae's trustee, founding chiefly on the practice in England, contended, that the Bank could rank on Wilson's estate for the balance only which was actually due at the date of the claim, and that a claim to a larger amount was inconsistent with the terms of the oath required by the bankrupt act. The Bank, on

the other hand, maintained, that the ranking must be regulated by the state of the debt, as at the date of the sequestration, not of the claim. The Court appointed a hearing, chiefly on the effect due to the specialty of the partial payments having been made before the bill fell due, and posterior to the sequestration. On this point, it was argued for Rae's trustee, that there never was a debt to the full amount of the bill, existing in the Bank as against Wilson's estate, the bill having been in part extinguished before it fell due. To this it was answered for the Bank, that by the bankrupt act, (§ 47 and 49), debts not exigible at the date of the sequestratation, are placed on exactly the same footing with those instantly payable, and that a dividend must be set apart for such debts. The Court unanimously sustained the judgment of the trustee, and dismissed the complaint.

The Court held, that a sequestration operated as an assignment of the debtor's effects to all his creditors for payment of their debts, whether then due or not, and that, therefore, the date of sequestration must be taken as the point of time at which to estimate the amount of the debt to be ranked.

Complainer's Authorities.—2. Bell, 286–288–290; Edie and Laird, June 20, 1797, (Ap. Adjud. No. 9); Stein, Nov. 16, 1790, (14111); Dunlop, Feb. 5, 1779, (14107); Creditors of Ederline, June 17, 1801, (Ap. Adjud. No. 13); Royal Bank of Scotland v. Scott, Smith, Stein, and Co., 2. Rose, 157.

Respondents' Authorities.—Fall's Trustees, May 27, 1790, (14135); M'Dougall, Jan. 5, 1801, (F. C.); Borthwick, Jan. 29, 1819, (F. C.); Affd. in H. of L.; Wildman, 1. Cook, 165.

FALCONER & JOHNSTON, W. S.—H. DAVIDSON, W. S.—Agents.

No. 431. W. WHITE, Petitioner.—*Cockburn.*
R. BALLANTINE, Respondent.—

July 4, 1823.
FIRST DIVISION.
H.

Application of Judgment.—Decree applying the judgment of the House of Lords, reducing, to a certain extent, a disposition and deed of settlement in favour of the respondent, and reversing a decree of absolvitor by the Court of Session.

W. DOUGLAS, W. S.—T. CRANSTOUN, W. S.—Agents.

No. 432. G. NORMAND, Pursuer.—*Irving*
A. MACARTNEY, Manager of the Commercial Bank, Defender.—*Clerk—Bell—Forsyth.*

July 4, 1823.
FIRST DIVISION.
Lord Alloway.
H.

Obligation—Bank-Agent.—Normand raised an action against the Commercial Bank for payment of a bill of £118, alleging, that, on the 7th of July 1819, he had carried it to their office at Kirkaldy, where he deposited it with Balfour, their agent, to be negotiated: that he received from him a letter acknowledging that 'I have received your order on London, 'for which I will account to you when payable; and 'am,' &c. 'JAMES BALFOUR;' and that the proceeds had been recovered by the Bank. In defence, the Bank stated, that Balfour was in the practice of acting as a private banker,—that Normand had transacted with him in that capacity,—that the receipt was not granted officially,—that the Bank had paid value for it to Balfour, (who was now insolvent); and, that Normand's claim lay against him alone. The bill was entered, of date the 27th July, to the credit of Normand, in Balfour's private books; and, of the same date, in those of the Bank, as having been

discounted to Normand. The Lord Ordinary decerned against the Bank, in respect they had received the contents of the bill, reserving to them relief against Balfour, for any fraud committed by him; and the Court adhered.

The Judges rested chiefly on the circumstance of the bill being entered in the books of the Bank, which, it was observed, distinguished it from Watson's case.

Defender's Authorities.—2. Bell, 673; Watson, March 26, 1813, (1. Dow, 40).

W. Cook, W. S.—J. A. Campbell, W. S.—Agents.

W. Sword, Suspender.—*More.*
J. Sword, Charger.—*Alison.*

No. 433.

July 4, 1823.

First Division.
Lord Alloway.
S.

This was a suspension of a charge on a decree-arbitral, in which no general point occurred. It resolved into an accounting; and the Court, after remitting to an accountant, decerned in terms of his report.

J. Marshall,—Campbell & Arnott, W. S.—Agents.

J. Sandy and his Factor Loco Tutoris, Pursuers.—*Moncreiff—Gillies.*
G. Sandy, Defender.—*Small Keir.*

No. 434.

July 4, 1823.

First Division.
Lords Gillies and Meadowbank.
D.

Parent and Child—Presumption—Legitimacy.—The late James Sandy was married to Margaret Bain on the 14th of March 1819, and died on the 3d of April thereafter. Bain was delivered of a son, (the pursuer), on the morning of the 1st of February

1820, being an interval of nine calendar months and 29 days from the death of Sandy. The brother of Sandy having taken possession of his property, an action was brought against him in name of the child, to account for it. In defence, he denied the legitimacy of the child,—stated that James Sandy had, from an early period of life, been confined to bed: that he was incapable of procreation: that Bain was a woman of immoral habits, having had bastards to different persons;—and he pleaded, that the lapse of time was, of itself, a sufficient proof of the illegitimacy. Lord Gillies found, 'that the lapse of nine 'calendar months and 29 days from the death of the 'husband of the child's mother, to the birth of the 'child, is not sufficient, per se, to overturn the pre-'sumption of the child's legitimacy;' but allowed a condescendence of the other averments in defence. Lord Meadowbank, having taken a different view of the rule of law, reported the case. The Court, before answer, allowed a proof as to the state of Sandy, from the date of the marriage till his death, and as to the character of the mother; on advising which, they waved the general point; and, in respect of the evidence, assoilzied the defender.

Pursuers' Authorities.—(General Point.)—S. St. S, 42; 2. Bankt. 2, 3; 1. Ersk. 6, 49; Stewart, Aug. 6, 1774, (11664); Morrison, Feb. 7, 1795, (not rep.); Routledge, May 19, 1812, (F. C.); 28. Dig. 16, 2; 1. Dig. 5, 12; Ridley's View of Civ. & Ec. Law, 76; Ayliff's New Pand. 86; Noodt, p. 26; Leeuwen, 33; 1. Blackst. 456; 2. Blackst. 241; Arist. Hist. Anim. 7, 4; Gellius Noct. Att. 3, 16; Pliny, Hist. An. 7, 5; Hamilton on Midw. 192; Burns on Mid. 114; 7. Cod. 63, 5.

Defender's Authorities.—(General Point.)—Ferguson's Astron. 240; Du Cange, 503; 1. Ersk. 6, 50; 38. Dig. 16, 3, § 11; Grav. Or. Jur. Civ. 261; 1. Bankt. 2, 3; Pand. Med. Leg. 1; 1. Du Cange, 514; 4. Dict. des Arrets. 461; 1. Quest. Med. Leg. 1, 2, § 32, &c.; 2. Fodere, Tr. de Med. Leg. 123; Auth. Med. Leg. p. 476; 1. Blackst. 456; 1. Mahon, Med. Leg.

J. Ramsay,—Brown & Lawson, W. S.—Agents.

G. EWING, Suspender.—*Maidment.*
T. HIBBERT, Charger.—*Cuninghame.*

No. 435.

July 4, 1823.

SECOND DIVISION.
Lord Pitmilly.
M'K.

Bill of Exchange.—This was a suspension, at Ewing's instance, of a charge on a bill of exchange granted by him to Hibbert, on the ground, that Hibbert had not delivered up to him one of a series of renewals, of which the bill charged on was the last; and he contended, that he was, at least, entitled to caution, that the former bill should never re-appear against him, before making payment of this one. The Lord Ordinary found the letters orderly proceeded; but the Court altered, and found that Hibbert must give security against the re-appearance of the undelivered bill.

R. BURN, W. S.—A. P. HENDERSON,—Agents.

A. MACDONALD, Suspender.—*Lumsden.*
MAGISTRATES of INVERNESS, Chargers.—

No. 436.

July 5, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord Mackenzie.
D.

Act of Grace—Prisoner.—Macdonald having been incarcerated for debt in Inverness jail, and having got an order, under the act of grace, on the creditor, to lodge aliment within ten days, applied, on the expiration of that period, for warrant of liberation, as no aliment had been provided. The Magistrates, on the 9th June, granted the warrant, on condition of his executing a disposition omnium bonorum. He complied with this; but alleged that the Magistrates refused to liberate him, because he was unable to pay to the town-clerk the dues of drawing the disposition; and that he had been detained for several hours

on that account. He presented a bill of suspension and liberation on the 11th, complaining, 1. That it was illegal to order him to grant a disposition; and, 2. To detain him for payment of these dues. But having been liberated on the night of the 9th, the Lord Ordinary refused the bill as unnecessary, and found him liable in expences; and the Court adhered.

Suspender's Authorities.—2. Bell, 586; Welch, Dec. 4, 1808.

S. F. MACINTOSH, W. S.—D. MACINTOSH, W. S.—Agents.

No. 437. WRITERS to the SIGNET, Suspenders.—*Solicitor-General Hope—Moncreiff.*
J. GRAHAM, Charger.—*Forsyth—Jeffrey—Sandford.*

July 5, 1823.

FIRST DIVISION. Bill-Chamber. Lord Mackenzie.

Society—Process.—By a judgment of the Court, (see ante, Vol. II, No. 192), it was found, that the Society of Writers to the Signet had power to suspend Graham from his office, or deprive him of it, in the event of violating their regulations. Against this he entered an appeal, and the Society, alleging that he had infringed their rules, presented a bill of suspension and interdict, praying that he should be prohibited from doing so in future. This was objected to as incompetent, being an indirect mode of applying for interim-execution. The Court, on report of the Lord Ordinary, refused the bill.

MACKENZIE & SHARPE, W. S.—D. FISHER,—Agents.

J. HAMILTON, Pursuer.—*Ivory.* No. 438.
G. ALSTON and Others, Defenders.—*M'Neill.*

Cessio.—Decree of cessio was here opposed on the ground of fraud; but the Court, seeing no evidence of it, decerned.

July 5, 1823.
FIRST DIVISION.
H.

J. SPENCE,—LINNING & NIVEN, W. S.—Agents.

R. JACK, Pursuer.—*Ivory.* No. 439.
D. M'LEOD and Others, Defenders.—*Matheson.*

Cessio.—Decree of cessio refused, in respect of a fraudulent abstraction and concealment of effects.

July 5, 1823.
FIRST DIVISION.
H.

RAMSAY & IMRIE, W. S.—INGLIS & WEIR, W. S.—Agents.

J. V. AGNEW, Petitioner.—*Jeffrey—Shaw.* No. 440.
EARL of STAIR and Others, Respondents.—*Cranstoun—Baird—A. Bell.*

Sequestration.—On the petition of Mr. Agnew, the Court, of consent, sequestrated all the portions of the entailed estate of Barnbarroch, possessed by the purchasers, who were parties to the appeal mentioned, ante, Vol. II, No. 300.

July 5, 1823.
SECOND DIVISION.
M'K.

J. FORMAN, W. S.—J. BELL, W. S.—Agents.

No. 441. MAGISTRATES of RENFREW, Suspenders and Pursuers.—*Walker.*
A. SPEIRS, Charger and Defender.—*Cuninghame*—*Speirs*

July 5, 1823.
SECOND DIVISION.
Lord Cringletie.
F.

Road.—This was a dispute as to the right of Speirs to alter the line of a foot-path, which was a servitude enjoyed by the town of Renfrew over the property of Speirs, in virtue of an agreement and decreet-arbitral, providing that the town 'shall have 'the privilege of a foot-road from the town of Ren-'frew to the Clyde, the said foot-road not to be 'further from the present ferry than the middle of 'the said Archibald Speirs's hay-field, adjoining to 'the west-side of the said road.' After a long litigation, and several reports by surveyors, as to the position of the hay-field, and the conveniency of the new line proposed, the Court ultimately found Spiers entitled to alter the line of road within these limits; he always, however, complying with the conditions pointed out in the surveyors reports, for securing to the town, 'a safe and convenient path.'

J. & W. FERRIER, W. S.—J. KER, W. S.—Agents.

No. 442. SIR W. F. ELLIOT, Pursuer.—*Ro. Bell.*
W. RIDDELL and Others, Defenders.—*Rutherfurd.*

July 8, 1823.
FIRST DIVISION.
Lord Meadowbank.
H.

Witness—Process.—Sir W. Elliot raised an action of reduction against Riddell and others, and before great avizandum was made, he moved the Lord Ordinary to grant warrant for the examination of a witness, aged 84, to lie in retentis. This was

opposed as incompetent, because a reduction is an Inner-House process, and no remit had been made to discuss the reasons. The Court, on report of the Lord Ordinary, and on advising a condescendence, granted warrant.

Farmer's Authorities—Smith, Jan. 21, 1802, (No. 5, Ap. Process); E. of Fife, March 11, 1815, (F. C.)

W. Bell, W. S.—J. Dundas, W. S.—Agents.

Turnbull's Trustee, Petitioner.—*Tawse.* No. 443.
M. G. and G. J. Turnbulls, Respondents.—*Sandford.*

July 8, 1823.

Second Division.
M'K.

Inhibition.—Turnbulls raised a reduction of a trust-deed of certain lands, alleging that the fee belonged to them, on which they executed an inhibition; thereafter, they brought a declarator, to have it found, that the lands were their property, and on it they also inhibited. The former inhibition was loosed on caution, and the declarator having been abandoned, the inhibition on it thereby fell. The Court, having repelled the reasons of reduction, (see ante, Vol. II, No. 1), Turnbulls appealed, and then brought a new declarator, with the same conclusions as the former one, and they again executed an inhibition on it. The Court recalled this inhibition without caution.

C. Tawse, W. S.—W. Jameson, W. S.—Agents.

No. 444. A. GILL, Suspender.—*Robertson.*
TRUSTEES of the late EARL of FIFE, Chargers.—*Ivory.*

July 8, 1823.
SECOND DIVISION. Bill-Chamber. Lord Mackenzie.

Trustee.—The Trustees of the late Earl of Fife agreed, in consequence of the general depreciation of agricultural produce, to allow Gill, a tenant on the Fife estates, a certain deduction from the rent stipulated by his tack; but being doubtful of their power to do so, Gill presented a bill of suspension. The Court, on report of the Lord Ordinary, passed it to the extent of the deduction agreed on.

J. S. ROBERTSON, W. S.—INGLIS & WEIR, W. S.—Agents.

No. 445. L. M'Intosh, Suspender.—*Moncreiff—Rutherfurd.*
R. FRASER, Charger.—*Robertson.*

July 8, 1823.
SECOND DIVISION. Bill-Chamber. Lord Mackenzie. B.

Interdict—Church-Seats.—The Magistrates of Inverness had, in virtue of a contract with the heritors, entered into at the building of the parish-church, a right to set and draw the rents of the seats. Having let a seat to Fraser, M'Intosh, who had for some years occupied it, by permission of one of the heritors, presented a bill of suspension and interdict against him. The Lord Ordinary passed the bill, but refused the interdict, 'in respect no evidence is produced 'of the right of the heritor,' and the Court adhered.

R. ROY, W. S.—H. FRASER, W. S.—Agents.

D. BARRY, Pursuer.—*Cockburn—Sandford.* No. 446.
J. GEDDES, Defender.—*Jeffrey—D. M'Farlane.*

July 8, 1823.

SECOND DIVISION.
Lord Cringletie.
B.

Title to Pursue.—Barry conveyed certain funds to Geddes in trust; and thereafter, in a process of cessio, he executed in favour of Crawfurd, a disposition omnium bonorum, for behoof of his creditors. Crawfurd, however, died without taking up the disposition, or having any intromission with the funds. Barry having thereafter raised an action of count and reckoning against Geddes, it was objected, that, without a retrocession from his creditors, he had no title to pursue. The Lord Ordinary found, that, being divested by the disposition omnium bonorum, 'it is not competent for him, hoc statu, to insist in 'this action;' and the Court adhered, remitting to the Lord Ordinary to consider evidence of a retrocession produced with the reclaiming petition.

J. MACALLAN, W. S.—W. DRYSDALE, W. S.—Agents.

MRS. MARY M'GREGOR, Widow of the late C. STEWART, Pursuer.—*Solicitor-General Hope.* No. 447.
P. M'GREGOR, Defender.—*Rutherfurd.*

July 8, 1823.

SECOND DIVISION.
Lord Pitmilly.
B.

Merchants Books.—The late C. Stewart was partner of M'Gregor, as linen-drapers in Edinburgh. His widow raised action of count and reckoning against M'Gregor; and the Lord Ordinary having remitted to an accountant to report on the state of accounts, and ordered production of the company books, M'Gregor reclaimed, and contended, that, as he still used the same books in con-

ducting his business, he was not bound to deliver them up, but only to allow the accountant to inspect them in his shop. The Court, however, refused his petition.

D. Christie,—J. Patison, Jun. W. S.—Agents.

No. 448. W. Dickson, Pursuer.—
G. Dickson, Defender.—*Robertson.*

July 8, 1823.
Second Division.
Lord Pitmilly.
F.

Joint Tack.—In the case, ante, Vol. I, No. 142, the Lord Ordinary, after some proceedings in the accounting between the parties, ordained the defender 'instantly to cede and give up to the pursuer a joint 'possession and management, along with him, of the 'lands, limeworks, and others, set and let by the 'tack and subtack libelled on, for the whole years 'and duration thereof yet to run.' The defender reclaimed, but the Court refused his petition, without prejudice, however, to his being heard as to the appointment of a manager for all concerned.

Defender's Authority.—Montague on Partnership, 96–7.

J. Kermack,—W. D. Scott, W. S.—Agents.

No. 449. A. Wight, Complainer.—*Cuninghame.*
A. Sutherland, Respondent.—*Whigham.*

July 9, 1823.
First Division.
H.

Removing—Advocation.—Sutherland obtained decree of removing from the Sheriff against Wight, who borrowed the process, for which a caption having been issued, he alleged that it had been lost. A summary application was then made by Sutherland for a

warrant of ejectment, which was granted and extracted. Wight offered a bill of advocation of the original process, on which he obtained and intimated a sist. On the following day, the warrant of ejectment having been executed, he presented a petition and complaint against Sutherland. The latter objected, that the advocation was irregular,—that the sist had not been intimated in due form,—that it did not apply to the warrant of ejectment,—and that the bill had since been refused. The Court dismissed the complaint.

J. Syme, W. S.—R. Ormistoun, W. S.—Agents.

J. Wotherspoon, Petitioner.—*Forsyth.*
W. Watson, Respondent—*Cuninghame—Fletcher.*

No. 450.

July 9, 1823.

First Division.
H.

Bankrupt—Sequestration.—Wotherspoon, designing himself victualler, vintner, stabler, and dealer, in Glasgow, applied, with concurrence of Hamilton, an heritable creditor, for a sequestration under the bankrupt act. This was opposed by Watson, another heritable creditor, who stated that there was no moveable estate,—that the only property consisted of a few acres of land, over which he had a first, and Hamilton a secondary security,—that Wotherspoon had not been in trade for upwards of twelve years,—and that he subsisted chiefly on charity. The Court refused to sequestrate.

Petitioner's Authorities.—54. Geo. III, c. 137, § 15; Cramond, Feb. 21, 1815, (F. C.); 2. Bell, 357.

J. Malcolm,—Greig & Peddie, W. S.—Agents.

No. 451. D. PATERSON, Pursuer.—
J. GRIEVE, Defender.—*D. Dickson.*

July 9, 1823.
FIRST DIVISION.
Lord Meadowbank.
H.

Process—Fee-Fund—A. S. 19th June, 1821.—The defender, in this case, had paid 15*s.* as fee-fund dues on a condescendence, and, when he lodged his revised condescendence, containing additional statements, the assistant clerk demanded £1 : 5*s.*, as additional fee-fund dues. The legality of this charge being disputed, the Court, on report of the Lord Ordinary, found, that no such charge was exigible.

J. SWAN, W, S.— —Agents.

No. 452. FOX MAULE, Pursuer.—*Cranstoun—Cockburn.*
HON. W. MAULE, Defender.—*Bell—Moncreiff—Murray.*

July 9, 1823.
FIRST DIVISION.
H.

Aliment—Parent and Child.—This was an action of aliment at the instance of Mr. F. Maule, the eldest son of the Honourable W. Maule, the heir of entail in possession of the estate of Panmure. He stated, that he was the apparent heir of entail to his father,—that he had been educated in a manner suitable to his rank and prospects,—that in 1819, his father had purchased a commission for him as an ensign in the 79th regiment of foot,—that the income which he thence derived was £90 per annum ; and that his father allowed him a farther sum of £100 a-year. This, however, he alleged, was quite inadequate to his present situation, and to his future prospects in life ; and that he had vainly and repeatedly applied to his father to increase its amount. He therefore concluded, that his father was bound, jure naturæ, and by the

act 1491, to aliment him suitably; and that he ought to be decerned to pay to him £2,000 a-year, or such sum as the Court should consider proper. In defence against this action, Mr. Maule admitted his liability to aliment his son; but maintained, that as he had performed this duty, by placing him in an honourable profession, which was productive of an income, and had secured to him a farther annual allowance, the Court had, in these circumstances, no jurisdiction to interfere, and to assume that parental discretion which belonged to him alone, of farther measuring out and apportioning the aliment. The Court, after a hearing in presence, and advising memorials, repelled the defence,—found Mr. Maule liable in a suitable aliment to his son; and ordained him to give in a condescendence of his whole free means and estate. Mr. Maule having done so, and estimated them at £10, 500 per annum, the Court decerned against him for £800 a-year.

The Court were unanimously of opinion, that although the father had a discretion in modifying aliment to his children, yet, that it was subject to their controul, where it was not exercised consistently with law and equity. But it was, at the same time observed, that it was only where a strong case was established that the Court would interfere.

Pursuer's Authorities.—4. Bankt. 45, 17; 1. Ersk. 6, 56; Dick, Jan. 13, 1666, (409); Ayton, Jan. 25, 1705, (390); Ramsay, July 1, 1687, (391); Lauder, June 14, 1765, (398); De Courcy, July 3, 1806, (No. 8, Ap. Aliment); 2. Craig, 17, 20; 25. Voet. 3, 3.

Defender's Authorities.—Kames Prin. of Eq. 80; 25. Voet. 3, 4; 6. Dow, 259; 1. Blackst. c. 16; Muir, Jan. 20, 1820, (F. C.)

J. F. Gordon, W. S.—Fotheringham & Lindsay, W. S.—Agents.

No. 453. J. & M. Pool, Pursuers.—*Jeffrey—Jameson—Christison.*

Mrs. Dirom and Husband, Defenders, et e contra.—*Murray—Blackwell.*

July 9, 1823.

Lord Justice-Clerk Hope.

Second Division. B.

Salmon-Fishing—Common Property.—J. & M. Pool, and Mrs. Dirom, were proprietors of adjoining properties on the river Annan. The titles of both included the right of fishings, but neither had any proper grant of salmon-fishings. Both parties, founding on alleged prescriptive possession, raised actions of declarator, to have it found that they had the exclusive right to the salmon-fishing in the Annan, within certain limits, extending, ex adverso, of both properties, and also to an island or sandbed, which had gradually arisen in the middle of the river. Mrs. Dirom's summons further concluded for the division of the island, if it should be found to be common property, but there was no such conclusion as to the fishings. On report of the Lord Ordinary, a proof of the possession was allowed, from which it appeared, that it had been common, and nearly equal. On considering this proof, the Court found, 'that both 'parties have established a sufficient title and possession of salmon-fishing, ex adverso of their respective 'lands, on the river or banks thereof; that neither party have shewn any written right or title to the island 'or sandbed in dispute, and that the same belongs 'to the parties, ex adverso of their respective properties.'

Carnegy & Shepherd, W. S.—A. Pearson, W. S.—Agents.

J. M'Rae and Others, Complainers.—*Solicitor-General Hope.*
G. M'Kenzie, Respondent.—*R. Thomson.*

No. 454.

July 9, 1823

Second Division.

F.

Bankrupt.—This was a complaint against M'Kenzie, at the instance of M'Rae, &c. the trustee, and commissioners on his sequestrated estate, for having written to them abusive letters relative to their conduct as trustee, &c. The Court, while they dismissed the complaint, found no expences due, in respect of the expressions used in the letters.

A. D. Fraser, W. S.—R. M'Kenzie, W. S.—Agents.

A. Reddie, Suspender.—*Skene.*
G. Baillie, Charger.—*Forbes.*

No. 455.

July 9, 1823.

Second Division.

Bill-Chamber.

Lord Mackenzie.

Tack—Removing—A. S. Dec. 14, 1756.—Baillie let a farm to Reddie, at a rent of £970, payable at Candlemas and Lammas, 'beginning the first term's 'payment at Candlemas 1822, being fore-rent.' In August 1822, no rent having been paid, the Sheriff, on Baillie's application, awarded sequestration of Reddie's crop and stocking, and appointed a judicial factor to manage the farm; and, in September, Baillie obtained decreet in an action of removing, on the A. S. 14th Dec. 1756. This decreet was extracted, and a charge given on it, in May 1823, when Baillie also obtained warrant of sale of Reddie's whole stock, &c. for payment of the rent fallen due at Candlemas 1823. Reddie presented a bill of suspension and interdict, without caution, on the grounds, 1. That when decreet was obtained in the action of

removing, in September, a year's rent was not due, Baillie having verbally agreed to postpone the terms of payment of the rent to Whitsunday and Martinmas; and this he referred to Baillie's oath; and, 2. That the proceeds of the crop, &c. sequestrated, along with counter-claims against Baillie, for putting the houses, &c. into proper repair, had more than liquidated the rent due. The Court, being satisfied that there was still a large balance due to Baillie, on the report of the Lord Ordinary, found the letters orderly proceeded.

Charger's Authorities.—Clerk, March 6, 1759, (7237); Hunter, Nov. 18, 1800, (Ap. Removing, No. 1); Kinloch, June 16, 1812, (F. C.)

N. W. ROBERTSON,—J. WAUCHOPE, W. S.—Agents.

No. 456.

G. REID, Suspender.—*Cockburn—Skene.*
MRS. J. LAING REID, his Wife, Charger.—*Forsyth—Moncreiff—Sandford.*

July 10, 1823.

SECOND DIVISION. Bill-Chamber. Lord Mackenzie.

Husband and Wife—Meditatio Fugæ.—In an action of declarator of marriage, Laing obtained decree against Reid, with expences; and having, thereafter, raised an action of adherence, and of aliment, she got an interim-decree for a certain sum. Reid being about to leave the country, she caused him to be incarcerated as in meditatione fugæ. He presented a bill of suspension and liberation, without caution, stating his willingness to live with his wife, and take her abroad with him. The bill was reported by the Lord Ordinary, and refused by the Court.

C. C. STEWART, W. S.—D. FISHER,—Agents.

J. ALSTON and TRUSTEES, Pursuers.—*Menzies.* No. 457.
J. M'ALISTER, Defender.—*Forsyth.*

July 10, 1823.

FIRST DIVISION.
Lord Meadowbank.
D.

Process—Proof—Witness.—Alston and his trustees, after having raised an action of declarator against M'Alister, on which parties had been heard, applied to the Lord Ordinary for warrant to take the deposition of several witnesses, (whose ages were from sixty to eighty years), to lie in retentis. This was refused; but the Court altered, and granted warrant.

Pursuers' Authorities.—Smith, Jan. 21, 1802, (No. 5, Ap. Pro.); Livingston, March 10, 1813, (F. C.); E. of Fife, March 11, 1815, (F. C.); Corbets, July 8, 1815, (F. C.); Forbes, March 11, 1820, (F. C.); Smeal, Dec. 22, 1821, (ante, Vol. I, No. 272).

R. S. WILSON, W. S.— —Agents.

A. BROWN, Suspender.—*R. Bell.* No. 458.
J. BRITWHISTLE, Charger.—*Blackwell—A. Wood.*

July 10, 1823.

SECOND DIVISION.
Bill-Chamber.
Lord Mackenzie.
B.

Tack—Summary Diligence.—Britwhistle exposed a farm to be let under articles of roup, containing a clause of registration, which provided, that the highest bidder should enter into a formal tack, with a sufficient cautioner, 'for payment of the yearly rent 'at which he should be preferred, in equal moities, at 'Whitsunday and Martinmas.' Brown was preferred, and entered into possession, but was not required to execute a regular tack. At the expiry of the lease, Britwhistle charged him on the articles of roup for payment of arrears. Brown presented a bill of suspension with caution, alleging that Britwhistle

had verbally agreed to allow a deduction of the amount charged for. The Lord Ordinary refused the bill, in respect of its containing no reference to Britwhistle's oath of the truth of the allegation. In a reclaiming petition, Brown contended, that a charge on the articles of roup for payment of rent was incompetent; that this could only be enforced by an ordinary action; and that the articles could only warrant a charge for execution of a tack. The Court altered, and passed the bill.

W. Bell, W. S.—D. Blackie, W. S.—Agents.

No. 459.

A. Heriot, Pursuer.—*Gillies.*
A. Mackinlay, Defender.—*Forbes.*

July 11, 1823.
First Division.
Lord Alloway.
H.

This was a special case. It was an action for the expences of buildings, which, it was alleged, were additional to those stipulated by a contract. The Lord Ordinary, on the report of an architect, assoilzied the defender, and the Court adhered.

A. M'Allan,—J. & W. Jollie, W. S.—Agents.

No. 460.

C. Veitch, Pursuer.—*White.*
G. Hamilton Dundas, Defender.—

July 11, 1823.
Second Division.
Lord Pitmilly.
M'K.

Process.—Veitch raised an action against Dundas for payment of a quantity of lime, founding on a valuation by arbiters mutually appointed, which he produced along with his summons. Dundas lodged dilatory defences, calling for production of the letter of appointment to the arbiters, on which, however,

Veitch had not founded in his summons, and which was not in his possession. The Lord Ordinary refused to order peremptory defences, and granted a diligence for recovery of the letter. Veitch reclaimed, contending that he was entitled to an order for peremptory defences, without production of this letter, on which he did not found. But the Court refused his petition, without answers.

Pursuer's Authority.—A. S. 11th Aug. 1787, § 5.

GIBSON, CHRISTIE, & WARDLAW, W. S.—G. DUNLOP, W. S.—Agents.

R. HILL and Others, Pursuers.—*D. M'Farlan.*
Captain SKENE and Others, Heirs of the late G. ALLAN, Defender.—

No. 461.

July 11, 1823.

SECOND DIVISION.
Lord Cringletie.
M'K.

A. S. July 7, 1810.—Hill, &c. raised action of constitution against the heirs of the late George Allan, of the island of St. Croix, of certain debts, which they alleged were due them by the deceased, and they produced a certificate of the master of one of the Courts of St. Croix, that their accounts, to the amount claimed, had been lodged with him. The Lord Ordinary having ordered a condescendence of their claims, in terms of the act of sederunt, they averred, that the deceased was owing them the amount claimed. The answers to this condescendence merely stated, that 'the accounts are not signed by the 'deceased,' and that the certificate was no evidence of the debts, but without expressly denying that the debts were truly due. The Lord Ordinary found, 'that there was no evidence of the debts being due

'by the said George Allan,' and assoilzied thde efenders. Hill, &c. reclaimed, and contended, that as the defenders had not expressly denied the averment in the condescendence, they must be held as confessed. The Court adhered to the finding of the Lord Ordinary, but remitted to his Lordship to hear further before he assoilzied.

TOD & WRIGHT, W. S.—A. C. M'LEHOSE, W. S.—Agents.

No. 462. J. J. WILSON, Petitioner.—*Forsyth—Jameson.*
J. B. FRASER, Respondent.—*Cranstoun—Moncreiff—Gillies.*

July 11, 1823.
SECOND DIVISION.
M'K.

Execution pending Appeal.—The case, ante, Vol. I, No. 357, having been appealed, Wilson presented a petition, praying for interim execution, 'such execution, however, to be suspended, in the event of the 'respondent's making regular payment of the interest of the foresaid principal sum of £4,000,' (the balance of the real debt still undischarged,) 'since 'due, and until final judgment shall be pronounced 'in the said appeal.' The Court granted execution, in terms of the prayer.

W. SMITH,—J. B. FRASER, W. S.—Agents.

No. 463. HUNTERS and COMPANY, Petitioners.—*Bell—Cowan.*
W. ALLISON and J. DUNCAN, Respondents.—*Moncreiff—More.*

July 11, 1823.
SECOND DIVISION.
F.

Recal of Sequestration.—Hunters and Company applied for the recal of a sequestration awarded against Allison, as 'a cattle dealer and grain dealer,' on

the ground, that he had not shewn such a dealing in cattle and grain as to entitle him to the benefit of the statute. Allison and Duncan, (the creditors concurring in the application for sequestration) contended, 1. That he had instructed a sufficient dealing; and, 2. That Hunters and Company having ranked under the sequestration, and voted for the election of a trustee, were barred, personali exceptione, from applying for its recal. The Court, satisfied that there had been a sufficient dealing in cattle to warrant the sequestration, refused to recal it.

Petitioners' Authority.—(2.)—2. Bell, 368.
Respondents' Authority.—(2.)—54 Geo. III, c. 137, § 32.

H. Cowan, W. S.—J. Hamilton, W. S.—Agents.

THE CASES

DECIDED IN

THE COURT OF SESSION,

WINTER 1823–1824.

ANDREW M. WELLWOOD, Pursuer.—*Solicitor-General Hope—Thomson.*
WELLWOOD'S TRUSTEES, Defenders.—*Cranstoun—Moncrieff—T. H. Miller.*

No. 464.

Tailzie.—Grassum.—By the entail of Garvoch, there is a prohibition to sell, alienate, impignorate, or dispone, 'or to set tacks or rentals of any 'part of the said lands and estate, *except* in the 'terms after mentioned, for longer space than 19 'years certain, or for the life of the setters;' 'and that none of the said tacks or rentals shall be 'set with diminution of the rental, excepting that 'the same be done without collusion, and by way 'of public roup, to the highest bidder.' This prohibition was guarded by the usual irritant and resolutive clauses. By the exception alluded to, it is declared that the heirs, 'notwithstanding of the 'restrictions before written with regard to the

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FIRST DIVISION.
Lord Alloway.
D.

'setting of tacks,' 'shall have full power to set 'tacks of the same, for such space of time as they 'shall think fit, provided that the same shall 'never be set at a smaller yearly rent than three 'bolls of oatmeal, at eight stone weight per boll, 'for each acre so to be set, and proportionally for 'any smaller quantity; and which rent or tack-'duty shall always be payable in kind, and never 'converted into money.'

The late Robert Wellwood, an heir of entail in possession, granted to Lord Elgin a missive of tack of part of the estate for 999 years, at the rent provided in the above clause, and for a grassum of £.12,000, which was to bear interest from Martinmas thereafter, but was not to be payable till after Mr Wellwood's death, and, at all events, not for five years.

In an action of implement against Lord Elgin, the Court ordained him to execute an heritable bond, in security of the £.12,000, payable to Mr Wellwood, his heirs and assignees; and in a declarator, brought by his Lordship, (to which he called all the heirs of entail in existence as parties,) the Court found, that the missive of tack was 'a 'valid and effectual right to the pursuer, both a-'gainst the granter and against the other defend-'ers, as substitute heirs of entail.' These judgments were affirmed in the House of Lords, where appearance was made for the pursuer of this action.

In the meanwhile, an heritable bond had been executed by Lord Elgin, in terms of the order of the Court, and Robert Wellwood conveyed it to

trustees, for behoof of his daughters. After his death, Andrew Wellwood, the succeeding heir of entail, brought an action to reduce the trust-deed, to have it declared that the heritable bond belonged to the heirs of entail, and to ordain the trustees to employ the contents in the purchase of additional rent, for the use of him and the subsequent heirs. His plea was, that the grassum was to be considered as the anticipated rent of the entailed property, and as such that it belonged to those who were to succeed to the estate. By the trustees, it was maintained in defence, that Robert Wellwood was vested in the fee-simple, so far as not fettered by the entail,—that the only limitation in his powers of setting the lands, was that the rent should be of a particular amount, which had been observed,—that the transaction had been decided to have been a legitimate exercise of powers,—that the grassum was not rent, but price; and that the bond had, under the orders of the Court, been executed in favour of Robert Wellwood, his heirs and assignees. The Lord Ordinary assoilzied the trustees, in respect of the judgments sustaining the leases, and that 'decree was granted in favour of the late Mr 'Wellwood, for payment of the grassums therein 'stipulated, without any restriction or limitation 'whatever;' and the Court adhered.

The pursuer rested chiefly on the case of Denham; but, independent of other circumstances, it was observed, that no power was there given similar to that which had been here conferred.

Pursuer's Authorities.—Denham, Jan. 15. 1761, (15512.); Opin. of Judges in Queensberry Cases, pp. 19. 24. 26. and in Ho. of Lords.

W. H. Sands, W. S.—J. Forman, W. S.—Agents.

No. 465.

J. Aitchison, Suspender.—*Shaw.*
J. Macdonald, Charger.—*H. J. Robertson.*

Nov. 12, 1823.

First Division. Bill-Chamber. Lord M'Kenzie. D.

Reference to Oath—Process.—Aitchison having been charged by Macdonald to pay his accepted bill, presented a bill of suspension, and referred to his oath, whether he was a bona fide onerous holder. Macdonald deponed in the affirmative, in general terms; but admitted that the bill belonged to him and his father jointly. Aitchison thereupon maintained, 1. That Macdonald not having the exclusive right to the bill, was not an onerous holder; 2. That the charge was irregular, as it ought to have been in name of the joint parties; and, 3. That he was entitled to the oath of the father. The Lord Ordinary refused the bill; and the Court, holding that the sole question was, whether the oath was affirmative of the reference, adhered.

Suspender's Authority.—(2.)—Inglis, Nov. 7. 1738, (16115.)

Campbell & Burnside, W. S.—M. N. Macdonald, W. S. Agents.

J. COCKBURN, and J. WATSON, his Trustee, Petitioners.
J. P. STORRIE and Others, Respondents.—*Neaves.*

No. 466.

Process.—Lord Glenlee, as Ordinary officiating on the Bills during vacation, pronounced an interlocutor in a process of sequestration depending before the First Division, against which Storrie and others reclaimed. But the Court, in respect they could not competently review an interlocutor of a Judge of the Second Division, remitted it thither.

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FIRST DIVISION.
Bill-Chamber.
Lord Glenlee.
S.

It was observed, that the form was to reclaim to the Second Division, by whom the petition might be remitted to the First.

A. NAIRNE,—W. WILLIAMSON,—Agents.

A. STEWART, Pursuer.—*Cuninghame—D. Dickson.*
EARL OF MINTO, Defender.—*Moncrieff—Graham Bell.*

No. 467.

Reparation.—Stewart, a tenant of Lord Minto, raised an action of damages against him, for non-implement of an obligation in the lease. Two questions arose, 1. Whether implement had been prevented by the inability of the tenant to perform an obligation on his part; and, 2. If not, what was the amount of the damage sustained? The Court, on report of the Lord Ordinary, found on the first point in the negative; and decerned for £. 1200 of damages.

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FIRST DIVISION.
Lord Alloway.
H.

W. RENNY, W. S.—J. J. FRASER, W. S.—S. C. SOMERVILLE, W. S.—Agents.

No. 468. J. CLARK and W. MILLER, Suspenders.—*D. M'Farlan.*
R. FINDLAY, Charger.—*Skene.*

Nov. 12, 1823.
SECOND DIVISION
Bill-Chamber.
Lord Pitmilly.
F.

Landlord and Tenant.—Findlay, as assignee of Gillespie, proprietor of a mill on the Kelvin, of which Clark and Miller were tenants, charged them for payment of £. 150 of arrears of rent. They presented a bill of suspension, on the ground that the landlord had failed to provide the supply of water guaranteed by their tack; for the damage occasioned by which, they had raised action before the Sheriff of Lanark. Having consigned £. 50, the Lord Ordinary passed the bill to that extent, but refused it quoad ultra. They reclaimed; and having at the bar offered consignation of the whole rent due at the date of the charge, the Court remitted to pass the bill.

GREIG & PEDDIE, W. S.—GIBSON, CHRISTIE & WARDLAW, W. S.—Agents.

No. 469. J. M'KEAN, Advocator.—*Robertson.*
J. DAVIDSON, Respondent.—*Henderson.*

Nov. 12, 1823.
SECOND DIVISION
Bill-Chamber.
Lord Pitmilly.

Joint Property—Urban Tenement.—Davidson was proprietor of the lower part, and M'Kean of the upper part of a house in Duke Street, Edinburgh. Davidson having proposed to convert the sunk and first floors into shops, for which purpose it was necessary to remove the front wall of them, and to support the upper wall of the house by props till it was rebuilt, applied for authority to

the Dean of Guild, who granted warrant to do so, 'the petitioner finding caution de damnis, before 'extract.' M'Kean presented a bill of advocation, which was passed by the Lord Ordinary; and on a petition by Davidson, the Court adhered.

Respondent's Authorities.—Fergusson, Nov. 12. 1816, (F. C.); Robertson, March 5. 1784, (14534.); Pirnie, June 9. 1819, (F. C.)
Advocator's Authority.— Sandy, &c. Feb. 15. 1823, (ante, Vol. II. No. 198.).

R. Henderson, ——— Agent.

A. Newbigging & Co.'s Trustee, Pursuer.— *Clerk—Bell—Buchanan.*
Trustees of Heywood, Collins & Co., Defenders.—*M'Farlan—Moncrieff.*

No. 470.

Nov. 12, 1823.

Second Division
Lord Pitmilly.
M'K.

Ranking of Cross Accommodation-bills.—Newbigging & Co. granted acceptances to Heywood, Collins & Co. for their accommodation, to the amount of £.1493; and, on the other hand, Heywood, Collins & Co. granted acceptances, for the accommodation of Newbigging & Co., to the amount of £.1488. The several bills, however, composing the two sets, did not correspond with each other, in date, sum, or period, and had not been directly exchanged for each other. Heywood, Collins & Co. became bankrupt while these bills were in the circle, and Newbigging & Co. were therefore obliged to pay the set of bills which had been accepted by themselves, and to retire those which had been granted to them. They were ranked on the estate of Heywood, Collins & Co. for the bills which had been accepted by that Company,

and drew a small dividend. Besides this, however, Newbigging & Co. farther claimed to be ranked, and to draw a dividend on the bills accepted by themselves, to the effect of obtaining full payment of the sum which they had paid in retiring the bills accepted by Heywood, Collins & Co. Their allegation was, that the two sets of bills were mutual accommodations, the one having been given in consideration of the other, and were intended as the means of relief in favour of the party by whom they should be all retired ;—that having paid the acceptances of Heywood, Collins & Co., they were entitled to rank on their own acceptances as counter securities, so as to be relieved to the extent of 20s. per pound on their advances. This was resisted by the Trustees of Heywood, Collins & Co., who maintained, that the bills granted by Newbigging & Co. were their proper debt, and that having been retired by them, the bills were extinguished ;—that there was no evidence of the alleged agreement;—and that the bills corresponded neither in date, sum, nor period, and had not been directly exchanged for each other. In the meanwhile, Newbigging & Co. had become bankrupt, and their trustee brought an action, to have it found that they were entitled to rank on their own acceptances. The Lord Ordinary decerned in their favour ; but the Court, on advising memorials, and a hearing in presence, altered, and assoilzied the Trustees of Heywood, Collins & Co. *.

* A similar question arose as to another class of bills, which it is unnecessary to notice particularly.

Some of the Judges doubted the case of Nairne; but without intending to touch that case, the Court held that here the bills were not counter parts; and that it would be very dangerous to sanction the practice of taking retired bills from repositories to serve as counter securities in such cases.

Pursuers' Authorities.—Nairne, May 13, 1796, (2597); Curtis, Dec. 9, 1794, and Feb. 23, 1797, (F. C. and Bell, 119.); Rolfe *v.* Caslon, 2. Blackstone, 570; 1. Bell, 224-5.

Defenders' Authorities.—Maxwell, Feb. 8, 1792, as reversed in H. of L. June 11, 1794, (2136.); 2. Bell, 277.

GIBSON, CHRISTIE & WARDLAW, W. S.—W. & A. G. ELLIS, W. S.—Agents.

J. KIBBLE, Advocator.—*Shaw.*
W. URE, Respondent.—*A. Wood.*

No. 471.

Nov. 13, 1823.

FIRST DIVISION, Bill-Chamber. Lords Hermand and Craigie. H.

Foreign—Proof—Caution in Advocation.—Ure, founding on a will executed in Grenada, raised an action before the Sheriff of Lanarkshire against Kibble, for a sum of money alleged to have been given to him by the deceased in loan or trust. The Sheriff repelled an objection to the will, that it was not valid by the law of the country where it was made, in respect he could not judge of the objection, and no challenge had been brought in the foreign court; found a defence of donation not proved; and ordained Kibble to lodge a condescendence under his own hand, stating whether he had received the full sum sued for. Kibble, with the leave of the Sheriff, presented a bill of advocation, (offering caution for the expenses in the Court of Session,) on the grounds, inter alia, 1. That he was entitled to a proof of his averment by the opinion of counsel, that the will was inept;

and, 2. That as loan or trust could only be proved by writ or oath, the order for the condescendence was incompetent. The Lord Ordinary refused the bill, in respect full caution was not offered; but the Court altered and passed it, on caution for expenses.

A. P. HENDERSON—DONALDSON & RAMSAY, W. S.—Agents.

No. 472.

J. CAMPBELL, Pursuer.—*Shaw.*
J. LITTLE, Defender.—*Alison.*

Nov. 13, 1823.

FIRST DIVISION. Lords Gillies and Meadowbank. S.

Compensation.—Campbell raised action against Little, for payment of money which had been delivered to him as his agent. Little admitted the debt; but pleaded compensation, on an alleged claim of damages, arising out of a neglect by Campbell to insure a vessel, of which Little was the ship's husband; and to support this plea, he proposed to sist the other owners as defenders. Against this defence, Campbell pleaded, 1. That as the money had been paid to Little as his agent, he was not entitled to propone compensation. 2. That the defence being founded on a claim for insurance, the Court had no jurisdiction to entertain it. 3. That the alleged claim was not due to Little, but to the owners, who could not be admitted as parties to this process. The Lord Ordinary decerned in terms of the libel, reserving the claim of damages; and the Court adhered.

It was observed from the Chair, that a plea of compensation is incompetent against a claim for money paid to an agent for behoof of his constituent.

Pursuer's Authorities.—(1.)—Campbell, Dec. 11, 1781, (2580); Muir, Dec. 28, 1711, (2659.)—(3.)—3. Ersk. 4, 13; 2, Bell. 97.
Defender's Authorities.—2. Bell, 333; Seton, Nov. 22, 1683, (2566.)

C. FISHER,—TENANT & LYON, W. S.—Agents.

Sir T. G. CARMICHAEL, Pursuer.—*Fullerton—Moncrieff—Gibson Craig.*
J. TAIT and J. FRASER, Defenders.—*Jeffrey—Matheson.*

No. 473.

Nov. 13, 1823.

SECOND DIVISION
Lord Pitmilly.
M'K.

Landlord and Tenant.—This was a question of fact. Tait and Fraser held a lease of a stone quarry belonging to Sir T. G. Carmichael, for payment of a lordship on the out-put, to be calculated at the rate at which it was sold at the date of the tack, or should afterwards be sold. Being builders by profession, Tait and Fraser appropriated large quantities to themselves, for which they charged themselves at the rates payable at the date of the tack. Sir T. G. Carmichael raised action against them for payment of the lordship, calculated at the value of the stones at the dates at which they made use of them. Their defence was, that Sir T. G. Carmichael had agreed to the mode in which they had debited themselves; and this being established, the Lord Ordinary and the Court assoilzied them.

GIBSON, CHRISTIE & WARDLAW, W. S.—G. VEITCH, W. S.—Agents.

No. 474. LIEUTENANT-COLONEL GORDON, Advocator.—
Cuninghame.
J. and W. FIDDLER, Respondents.

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FIRST DIVISION.
Lord Meadowbank.
D.

Interdict.—After Colonel Gordon had obtained an interdict against the respondents, his tenants, prohibiting them from carrying any of the fodder off the farm, he presented a complaint, alleging that they had violated the interdict. In defence they stated, that in consequence of two stacks being infested with vermin, they were under the necessity of removing them to the farm of a neighbour, in order to be thrashed; but that the straw had been brought back immediately after the operation was finished. The inferior court assoilzied the respondents, with expenses, in respect that 'the interdict could in no sense apply to the 'grain; that the respondents were laid under the 'necessity of a temporary removal of the straw 'and grain, in order to separate the former from 'the latter; and it appears that the straw had 'been returned to the possession, at least that no 'part of it was otherwise disposed of.' In an advocation, the Lord Ordinary and the Court adhered.

J. S. ROBERTSON, W. S.—J. MORRISON, W. S.—Agents.

A. CRAIG, Suspender.—*White.* No. 475.
W. BUDGE, Charger.—*Murray.*

Expenses.—This was a question of expenses, in which no general point occurred. The Lord Ordinary found them due to Budge, and the Court adhered.

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Lord Meadowbank.
H.

D. CLYNE.—BROWN & LAWSON, W. S.—Agents.

J. T. and A. DOUGLAS and Co., and Others, Pursuers.—*Clerk—Moncrieff—Skene.* No. 476.
J. GLASSFORD, Defender.—*Dean of Faculty Cranstoun—Fergusson—Thomson.*

Tailzie.—On the 6th of August 1783, John Glassford executed an entail of his estate of Dougalston, in favour of his son Henry Glassford, and a series of substitute heirs, containing the usual prohibitions. Eight days thereafter, he granted a conveyance of all his property, real and personal, with the exception of Dougalston, in favour of trustees, (of whom Henry Glassford was one,) for the purpose of winding up his affairs, of paying his debts, and protecting the entailed property. Being engaged in several commercial establishments, he gave power to his trustees to borrow money for the purposes of the trust, with the view of preventing loss by the premature realization of his funds, and the arrangement of his affairs. For the surplus, if any, they were bound to ac-

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FIRST DIVISION.
Lord Alloway.
H.

count to Henry Glassford, or the heir of entail in possession.

The entail was duly recorded, and infeftment taken; and on the death of his father, Henry Glassford took possession. He contracted debts, to a considerable amount, to Douglas and others; and on his death, he was succeeded by his brother, the defender, as the next heir of entail. Douglas and others, alleging that the entail was ineffectual to protect the estate against the debts of Henry Glassford, brought an action of constitution and declarator against the defender, as his representative. His defence was, that he did not represent his brother; and that the entail was sufficient to protect the estate. Douglas and others maintained, that the entail was inept, on two grounds; 1. That by the relative trust-deed under which Henry Glassford was a trustee, and by which power was given to borrow money and contract debt, the prohibition in the entail against contracting debt on the estate was virtually recalled; and, 2. That the resolutive clause was not effectually directed against him.

In the entail, all the prohibitions were made against Henry Glassford nominatim, and the heirs of entail generally; and the irritant and resolutive clauses, (which were united in one,) provided, that 'in case the said Henry Glassford, or any of the 'heirs of tailzie and provision substituted to 'him, as before written, shall fail or neglect to 'observe and fulfil any one or more of the condi-'tions before specified, or shall do or act con-'trary to, or contravene any one or more of the li-

'mitations and prohibitions before written, then, 'and in every such case, not only shall all and 'every one of such acts and deeds, with all that 'shall happen or be competent to follow there-'upon, or upon the failure or neglect to observe 'and fulfil any of the foresaid conditions or pro-'visions, be, as they hereby are declared to be, 'funditus void and null, and of no force, strength 'or effect whatever, in the same manner as if no 'such failure or neglect had ever happened, and 'as if no such acts or deeds had ever been done 'or granted; but also each and every heir or per-'son so contravening, or acting contrary to the 'said limitations and prohibitions, or any of them, 'or failing or neglecting to fulfil the said condi-'tions and provisions, or any of them, shall, for 'him or herself alone, immediately on such con-'travention, failure or neglect, forfeit,' &c. Power was then given to any substitute heir to make up titles to the contravener, who, it was declared, shall be 'in no respect affected by any alteration, 'innovation or change attempted to be made by 'the contravener, and without any burden or in-'cumbrance from, or by any act or deed, failure 'or neglect of the preceding heir or heirs, im-'porting a contravention of the foresaid condi-'tions or provisions, limitations and prohibitions, 'or any of them.' These clauses, it was contended by Douglas and others, were ineffectual to protect the estate against Henry Glassford's debts; because, *first*, the resolutive clause was directed against 'each and every heir or person,' which could not include the institute; and, *second*, that

in the subsequent part, although it was declared, that any substitute heir might make up titles without being affected by the act of the contravener; yet it was not declared that he was to take up the estate without representing him. The Lord Ordinary having reported the case on informations, the Court, by a majority, assoilzied the defender; and on advising a petition and answers, (also by a majority,) adhered, and found no expenses due.

Two of their Lordships declined, at the last advising, to judge, as they had discovered that they had an interest; but one of them had previously delivered an opinion in favour of the defender. The Judge who dissented was chiefly influenced by the decision in the case of Steele; but the two other Judges held that, from the whole context, it was impossible the word *person* could apply to any one except to Henry Glassford; that the case of Syme was a direct precedent; and that Steele's was of a very special nature. None of the Judges placed any weight on the objection founded on the trust-deed.

Pursuers' Authorities.—Steele, May 12, 1814, (F. C.); 5. Dow, 73.
Defender's Authority.—Syme, Feb. 27, 1799, (15475.).

GIBSON, CHRISTIE, & WARDLAW, W. S.—J. G. HOPKIRK, W. S.—Agents.

T. Fraser and J. B. Fraser, Suspenders.—*Solicitor-General Hope—Robertson.*
J. Laing and Mandatary, Chargers.—*Matheson.*

No. 477.

Proof—Production of Writs.—In a suspension by Fraser of a charge at the instance of Laing, a diligence was granted for the recovery of writings relative to the amount of an account which Fraser was entitled to set off against the sum charged for. Under this diligence Laing was examined as a haver, who objected to produce certain papers which were called for, on the ground that the suspenders did not allege 'that these, or any of 'them, will show the amount of the charges he 'has undertaken to pay, or the items of the ac-'count.' The Lord Ordinary found, 'that the 'objections stated for Mr Laing, to his being 'called upon as a haver to produce the writings 'required from him, are well founded,' and circumduced the term, which had been several times renewed. The suspenders reclaimed; but the Court adhered, without prejudice to their calling for production of any specific writings.

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M'K.

J. B. Fraser,—Geo. Veitch, W. S.—Agents.

W. M'Farlane, Suspender.—*A. M'Neill.*
R. Clyde, Charger.—*Marshall.*

No. 478.

Expenses.—In an action before the Magistrates of Glasgow, at the instance of Clyde, against M'Farlane, the latter was allowed a proof of his defence; but having failed to bring it, decreet

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Lord Pitmilly.
B.

was given against him. Having suspended, the Lord Ordinary remitted to the Magistrates to recall their decreet, and allow M'Farlane a proof of new, 'reserving all questions of expenses to the 'issue of the cause.' Clyde reclaimed against the reservation of expenses, contending, that before decreet was opened up, the previous expenses should be paid by M'Farlane. The Court altered so far as to remit to the Magistrates to consider what part of the expenses should be paid before allowing the proof.

J. ANDERSON jun.—Agents.

No. 479.

R. KEAY, Advocator.—*J. Wilson jun.*
A. CRAWFORD, Respondent.—*A. M'Neill.*

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SECOND DIVISION
Lord Cringletie.
F.

Tradesman's Account—Credit.—Keay ordered some clothes from Crawford, a tailor, in August 1821, and an additional quantity in June thereafter. In August 1822, Keay having failed to pay for the first furnishing, Crawford raised action before the Sheriff for payment of both. Keay alleged, as to the furnishing in June, that he was entitled to a year's credit, by the custom of the trade. The Sheriff having decerned against him, he brought an advocation. The Lord Ordinary remitted simpliciter, and the Court refused a reclaiming petition, without answers.

The Court considered, that, in such cases, the credit runs from the first article in the account, and not from each item separately; but that if a customer fail to pay an account, after the expiry of the usual period of credit, the tradesman may forthwith insist

on payment of the subsequent furnishings, deducting discount.

J. G. Balfour, W. S.—W. Guthrie,—Agents.

Dr J. Balmanno and Col. Mure, Petitioners.—*A. Bell.*
H. Paul, T. Graham's Trustee, Respondent.—*Ivory.*

No. 480.

Nov. 15, 1823.

Second Division M'K.

Sequestration, application for recall of.—Graham having been sequestrated, Dr Balmanno, one of his creditors, petitioned to have it recalled. The Court pronounced an interlocutor, recalling the sequestration; against which Paul, the trustee, petitioned; and Dr Balmanno having withdrawn his appearance, the petition was appointed to be intimated to the creditors generally, when appearance was made for Colonel Mure. Paul contended, that Dr Balmanno, the original petitioner, having withdrawn his appearance, it was incompetent for any other creditor, who had not applied to the Court, in terms of the bankrupt act, within sixty days after the sequestration, to take advantage of an application made by another creditor; but the Court, (14th June 1823,) repelled this objection to the competency of Colonel Mure's appearing. He, however, having also withdrawn his appearance, and no other creditor coming forward to oppose Paul's petition, the Court, in respect thereof, granted its prayer, and sustained the sequestration.

James Hill, W. S.—Gibson, Christie & Wardlaw, W. S. —Agents.

No. 481. J. SMITH, Suspender.—*Cockburn—Neaves.*
D. DREEVER and Others, Chargers.—*Gordon.*

Nov. 15, 1823.

SECOND DIVISION
Lord Pitmilly.
M'K.

Insurance—Total or partial Loss—Abandonment.—Dreever and others effected a policy of insurance on their ship, the Queen of Naples, on a voyage from Leith to Oporto and Gibraltar, of which Smith underwrote £.300. The vessel having been stranded off Vigo, Dreever, &c. raised action for payment, as of a total loss, before the Court of Admiralty. The Judge-Admiral decerned against Smith, who suspended, on the grounds, 1. That the vessel was unseaworthy; and, 2. That the loss was only partial, and that there was no abandonment, and no notification of abandonment to the underwriters. The Lord Ordinary reported the case, and the Court appointed mutual condescendences. As to the abandonment, Dreever, &c. merely averred, 'that the master, acting for behoof of all concerned, found it necessary to abandon, and did 'abandon,' and obtained a warrant to sell the vessel from the Magistrates of Vigo, which was accordingly done. As to the notification, their allegation was, that the master wrote to the insurance-broker, 'communicating the misfortune 'which had happened, and the necessity of discharging the cargo which had thereby arisen:' and, as to the loss, it was admitted, that the vessel having been sold after undergoing a slight repair, put to sea on another voyage, immediately thereafter. Smith gave up the plea of unseaworthiness, but contended, 1. That the damage alleged was not sufficient to warrant an abandonment,

which was here necessary to create a claim for a total loss. 2. That it was the insured alone, and not the master, who could abandon; and, besides, that the facts alleged did not amount to an abandonment even by the master: And, 3. That the notification to the broker was not a notification of abandonment, and was dated some days prior to the alleged abandonment, and, at all events, that it ought to have been made to the insurers themselves. The Court found, 'That the charger is 'only entitled to a partial loss, and remitted to 'the Lord Ordinary to hear parties as to the 'quantum.'

The Judges were of opinion, that there were no circumstances sufficient to justify abandonment.

Suspender's Authorities.—(1.)—Marshall, p. 582-3; 1. T. R. 187; Park, 186.—(2.)—Marshall, 559, 561, 449, 494, 590, 599.
Chargers' Authorities.—(1.)—Marshall, 559, 580, 58, 3-8-9.—(2.)—Marshall, 615; Doug. 219.—(3.)—Park, 172; Marsh, 600.

D. MURRAY,—J. PEAT,—Agents.

W. JOHNSTON, Advocator.—*Baird—Graham Bell.*
MARY BROWN, Respondent.—*Jameson—Christison.*

No. 482.

Nov. 15, 1823.

SECOND DIVISION
Lord Cringletie.
M'K.

Marriage—Process.—Mary Brown raised action of declarator of nullity of marriage and putting to silence against Johnston, on the ground that, at the time when she declared an irregular marriage before a Justice of Peace, and for the three days thereafter during which she cohabited with Johnston, she was incapable, by reason of stupefaction occasioned by intoxication,

of giving a rational consent, or of understanding what she did; and Johnston raised a counter action of declarator of marriage. The Commissaries allowed a proof; on advising which, they decerned in the declarator at Brown's instance, and assoilzied in that at the instance of Johnston. Johnston presented a bill of advocation, praying for a remit to be allowed farther proof; which being refused by the Lord Ordinary, he reclaimed; but the Court being satisfied that the continual inebriety of Brown, so as to prevent her from giving a valid consent, was completely established, and that Johnston had enjoyed a sufficient opportunity of adducing all his proof, adhered to his Lordship's interlocutor.

J. CHALMERS, W. S.—R. FLEMING, W. S.—Agents.

No. 483.

H. BOLTON, Pursuer.—*Campbell.*
D. CAMPBELL and Others, Defenders.—*Clerk—Skene—M'Neill.*

Nov. 18, 1823.

FIRST DIVISION. Lord Alloway. S.

This was a special case. It was a claim by Bolton, a road-maker, against a Committee of Road Trustees, for payment of work performed on a road, over and above what was stipulated in a contract. The Lord Ordinary, after a report from surveyors, decerned against them; and the Court, after another report, adhered.

R. CAMPBELL, W. S.—CAMPBELL & CLASON, W. S.—Agents.

J. THOMSON, Advocator.—A. M'NEILL. No. 484.
F. M'LAUCHLANE and OTHERS, Respondents.—
M'Farlane.

Nov. 18. 1823.

FIRST DIVISION.
Lord Alloway.
D.

Bill of Exchange—Proof.—Thomson, in March 1821, raised an action before the Sheriff of Perthshire, on a bill accepted by M'Lauchlane and others, payable in October 1816, to Lennox, by whom it was blank indorsed. The defence was, that Thomson was not an onerous bona fide holder, that the bill had been placed in the hands of his brother as a trustee, who had fraudulently delivered it to Thomson without value. Thomson admitted that he had received the bill from his brother; but alleged that he had paid value, and maintained that the defence could be proved only by writ or oath. The Sheriff ordained him to state, in a writing under his hand, the nature of the value, and the mode in which he had acquired the bill. Having done so, and given a statement inconsistent with the terms of the bill, the Sheriff assoilzied. In an advocation, the Lord Ordinary repelled the reasons, 'in respect the complainer 'admits that he received the bill sued on from 'A. Thomson his brother, who is alleged to have 'been the trustee of Lennox, the drawer thereof, 'and in respect of the mora which has taken place, 'the action for payment not having been brought 'for three years after the term of payment of the 'bill, and after the bankruptcy of A. Thomson.' The Court refused a petition.

Advocator's Authorities.—Chitty on Bills, 134-140; 1. Bell. 315; 3. Ersk. 2, 14; Wright, June 24, 1809, (F. C.); Craig, Dec. 5, 1809, (F. C.); Scott, Dec. 19, 1809, (F. C.); Arrol, June 14, 1821, (ante Vol. I. No. 83.); Donaldson and Co. Feb. 2, 1822; (ante, Vol. I. No. 328); Monro, Feb. 8, 1822, (ante, Vol. I. No. 344.)

D. GIBSON,—TOD & WRIGHT, W. S.,—Agents.

No. 485. MRS CAMERON or M'NIELL, Pursuer.—*Solicitor-General Hope—Dean of Faculty Cranstoun.* D. STEWART, Defender.—*Moncrieff—Keay.*

Nov. 18. 1813.

FIRST DIVISION. Lord Alloway. S.

Caution de judicio sisti.—M'Niell granted to the pursuer a bond of annuity of £.40, payable 'yearly, and every year during the term of her natural life.' After having incurred arrears, he was about to leave the country, when she presented a petition to the Sheriff of Lanarkshire for a meditatio fugæ warrant. She there stated, that she was about 'to raise the necessary and proper action 'against the said R. H. M. M'Niell, to enforce 'payment of the arrears of the said annuity, and 'interest thereon;' prayed for warrant to incarcerate him 'until he find good and sufficient caution, &c. de judicio sisti, in any action which 'the petitioner may institute against him for payment of the said annuity, and interest thereon;' and deponed that 'the whole bygone arrears of said annuity' are still resting owing. M'Niell having been apprehended and examined, warrant was granted to imprison him 'until he finds caution judicio sisti, to answer to any action which 'the petitioner may institute against him for pay-

'ment of the debts mentioned in the petition, 'within six months from this date.' Stewart, as cautioner, granted bond de judicio sisti, 'for pay-'ment of the debts mentioned in the petition pre-'sented by her to the Sheriff-depute of Lanark-'shire.' An action was then brought against M'Niell, concluding to have him decerned 'to 'make payment to the pursuer of the foresaid 'annuity of £.40, at the terms, and by the pro-'portions specified in the foresaid deed of agree-'ment, in all time coming, during her natural life.' Stewart failed to present M'Niell, and the Lord Ordinary therefore decerned against him in terms of the libel. He reclaimed, and pleaded, that he could not be found liable for more than the arrears due at the date of the bond, whereas the Lord Ordinary had decerned against him for payment of the annuity in all time coming. The Court, after ordering memorials, altered, and found that the obligation in the bond extended only to arrears; but an allegation having been made, that Stewart held a trust-conveyance of M'Niell's estate, they ordered him, before farther judgment, to produce the deed.

Their Lordships were agreed, that caution might legally have been required for payment of the future annuities; but held that the decision must be governed by the terms of the bond of caution, and the relative petition, which regarded arrears only.

D. M'Lean, W. S.—D. Stewart,—Agents.

No. 486. W. HORNE, Pursuer.—*Solicitor-General Hope—Campbell.*

J. SMITH and G. DUNBAR, Defenders.—*Jeffrey—Robertson.*

Nov. 18, 1823.

FIRST DIVISION. Lord Meadowbank.

H.

Caution de judicio sisti.—Lloyd, an Englishman, after having been apprehended, at the instance of Horne, on a meditatio fugæ warrant, was liberated on the defenders granting bond of caution, on the 4th September 1822, that he should appear and stand trial in any action to be raised against him within six months; and specified a house within the county of Caithness as his domicil. Nothing was said as to the induciæ; and thereafter Lloyd left Scotland, and remained abroad. A summons before the Court of Session was raised against him, and signeted on the 3d of February 1823; was executed at the appointed domicil on the 17th of the same month, on induciæ of 27 days; and was called on the 16th of May thereafter. The defenders having been required to produce Lloyd, they objected, 1. That although the bond of caution specified a domicil, yet Lloyd was a foreigner actually residing abroad, and as the long induciæ had not been dispensed with, the warrant and citation on induciæ of 27 days were inept: And, 2. That although the summons had been raised and executed within the six months, yet the action had not been brought into Court till that period had elapsed. The Lord Ordinary having reported these objections, the Court repelled them, and remitted to his Lordship to proceed accordingly.

The Judges held, that quoad this action, Lloyd must be considered as a domiciled Scotsman; and that it was effectually brought, by being executed within the six months.

Pursuer's Authorities.—(2.)—4. St. 3, 20. and 21; 4. St. 13. 2; 4. Ersk. 1, 4; Gordon, Mar. 3, 1775, (8833.); 1584. c. 138; 1594, c. 219; Butter, Feb. 15, 1665, (11232); Ainslie, July 1665, (11232); 2. St. 12. 26.

Defenders' Authorities.—(1.)—4. Ersk. 1. 6.; 50. Geo. III. c. 113. § 27; 2. Jurid. St. 85.—(2.)—4. Ersk. 1. 8; Ross, July 22, 1758, (11996); Wilsons, June 25, 1788, (12003.)

J. Gordon, W. S.—A. W. Goldie, W. S.—Agents.

James Mylne, Advocator.—*Pyper.*
James Smith, Respondent.

No. 487.

Nov. 18, 1823.

Second Division
Bill-Chamber.
Lord Cringletie.

Conditional obligation—Informal missive—Rei interventus.—Smith having incarcerated George Mylne, for a debt due by him, liberated and discharged him on his brother James granting a missive, binding himself to pay the debt, 'upon my 'said brother's acquiring right to, and obtaining 'possession of the farm of Haddo of Mithleat, if 'that shall ever happen.' George Mylne's right to the farm was then disputed by one Imlay, who was in possession, and who, on this Court deciding in Mylne's favour, appealed to the House of Lords. On an application for execution pending appeal, by James Mylne, as assignee of, and representing his brother George, now dead, he was put in possession of the farm *. Smith then

* See ante, Vol. I, No. 310.

raised action for payment of the debt contained in the missive. The Sheriff having decerned against Mylne, he presented a bill of advocation, on the grounds, 1. That the missive was without a stamp, and otherwise informal; and, 2. That the possession meant in the missive was not actual but legal, and that the condition could not be held as purified during the subsistence of the appeal. It was answered, 1. That the liberation of George Mylne was such a rei interventus, as to bar any plea of informality; and, 2. That the appeal was now dismissed. The Lord Ordinary refused the bill, and the Court adhered.

J. Morrison, W. S.—J. Hunter, W. S.—Agents.

No. 488. Mrs. K. Lowson, Suspender.—*Sandford—Shaw.*
J. Mathew, Assignee of J. Robson, Charger.—
Jeffrey—Buchanan.

Nov. 18. 1823.

Second Division Lord Cringletie. F.

Bill of Exchange.—Robson charged Mrs. Lowson, on a bill drawn by him and Martin, on which her name appeared as acceptor. She suspended, and stated, 1. That the signature was not adhibited by her, for she was unable to write, but had been made by her daughter, without her authority; and, 2. That Robson had paid no value to her for the bill. To this he answered, 1. That Mrs. Lowson was in the custom of authorising her daughter to put her name to bills and other documents, and that she had done so on this occasion; and, 2. That although he had paid

no value directly to Mrs Lowson, yet he had been induced, by seeing her name at the bill, to sign as a drawer; that she had entrusted it to Martin to get it discounted, and apply the proceeds to retire a bill of her's, then lying at the bank, but that he had applied them to his own use; and that he, Robson, had been obliged to pay the contents to the bank. Thereafter, having assigned the bill to Mathew, the Lord Ordinary reported the case. The Court being satisfied, 1. That Mrs Lowson was not in trade, nor in use to accept bills; that her daughter never accepted for her without special authority, which she had done only about six times in the course of her life; and, 2. That the bill having been indorsed by Robson as well as Martin, the proceeds must be held to have been applied to their joint behoof, suspended the letters simpliciter.

A. DUNCAN,—W. MILLER,—Agents.

R. STEWART, Advocator.—*Cuninghame.*
W. ROBERTSON, Respondent.—*Greenshields.*

No. 489.

Property—Gable.—Robertson was proprietor of a house in Cowcaddens, near Glasgow. Stewart having acquired a piece of ground adjoining to it, began to build a house immediately contiguous to that of Robertson, without previously obtaining his consent to the plan, or the authority of the Sheriff. Robertson, alleging that his property would be injured by the proposed

Nov. 20, 1823

FIRST DIVISION. Bill-Chamber. Lord Succoth. H.

plan, applied to the Sheriff for an interdict, who remitted to an architect to examine the premises. He reported, that instead of erecting a gable, Stewart had placed standards, with lath, attached to his joists,—that these did not touch Robertson's gable,—but that the lath of the ceiling and the warping of a wall were fixed to it, which, however, he stated, would not be productive of injury to Robertson, provided an apron of lead were placed at the joining of the two roofs, which he suggested should be done at Stewart's expense. The Sheriff approved of the report, and refused the interdict; but found Stewart liable in expenses, in respect he 'ought not to have commenced 'any operations at all affecting Robertson's gable, 'without his consent, or without legal authority 'if that consent had been refused, and that the 'operations are for his sole benefit.' But in an advocation the Lord Ordinary, in respect that the operations proposed by Stewart were the same as those suggested by the architect, with the exception of the apron of lead, remitted with instructions to find neither party entitled to expenses. Robertson reclaimed, and maintained, that the operations ought not to have been begun at all without his previous consent, or, if refused, the authority of the Sheriff. But the Court adhered.

A. P. Henderson,—Mack & Wotherspoon, W. S.—Agents.

FORBES' TRUSTEES, Pursuers.—*Dean of Faculty Cranstoun—Buchanan.*
L. KINLOCH, Defender.—*Moncrieff—Rutherfurd.*

No. 490.

Nov. 20, 1823.

FIRST DIVISION.
Lord Alloway.
D.

Interim Decree.—This was a special case, involving a question of accounting. The present branch of it regarded the propriety of issuing an interim decree against the defender. The Lord Ordinary and the Court being satisfied, from the report of an accountant, that he had sufficient funds in his hands, independently of all counter claims, decerned against him.

H. M'QUEEN, W. S.—Æ. M'BEAN, W. S.—Agents.

J. M'FARLANE, Advocator.—*More.*
J. FORRESTER, Respondent.—*Neaves.*

No. 491.

Nov. 20, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord M'Kenzie.

Arrestment—Sequestration.—M'Farlane applied to the Sheriff of Stirling, and obtained a warrant of sequestration of stocking against his tenant for current rent, and of sale for arrears, which had been past due more than three months. After the sale, and while the proceeds were in the hands of the commissioner appointed to superintend it, Forrester, a creditor of the tenant, arrested them. They were afterwards ordered to be consigned with the Sheriff-clerk, and M'Farlane then arrested in his hands. Forrester having claimed a preference, the Sheriff preferred him, so far as not excluded by the hypothec. M'Farlane presented a bill of advocation, maintaining that the arrestment was inept, and that the decree on

which it proceeded had been recalled as in absence. The Lord Ordinary refused it, and the Court adhered, without prejudice to his grounds of debt.

Advocator's Authority.—2. Bell, 78.

G. DUNLOP, W. S.—Agents.

No. 492. J. HOGG, Pursuer.—*Maitland.*
T. MINORGAN, Defender.—*Menzies.*

Nov. 20, 1823.
SECOND DIVISION
Lord Pitmilly.
M'K.

Cautioner—Parent and Child.—Hogg pursued Minorgan for furnishings made to his son, on the ground that he had guaranteed the payment. The Lord Ordinary having allowed a proof, found 'that the pursuer has failed to instruct his libel,' and assoilzied Minorgan; and the Court adhered.

J. ADAMS,—J. YOUNG, W. S.—Agents.

No. 493. W. LAING, Petitioner.—*Rutherfurd.*
EARL OF STRATHMORE, Respondent.—*Baird.*

Nov. 21, 1823.
FIRST DIVISION.
D.

Execution pending appeal.—The case betwixt these parties (ante, Vol. II. No. 200.) having been appealed, Laing applied for interim execution. The Court granted warrant to sequestrate the pictures which he had poinded in the Palace of Holyrood.

A STEELE, W. S.—J. HAMILTON, W. S.—Agents.

A. LAIRD, Advocator.—*Neaves.*
A. AITKEN, Respondent.—*Ro. Bell.*

No. 494.

Nov. 21, 1823.

FIRST DIVISION.
Bill-Chamber.
Lords Robertson and M'Kenzie.

Slander.—Aitken having brought an action of damages against Laird for slander, the inferior court decerned against him for £.50. He presented a bill of advocation, and endeavoured to show, 1. That the charge had not been proved; and, 2. That at all events he had stated the circumstances on which it was founded in discharge of his duty. But the Lord Ordinary and the Court being satisfied that the judgment was well founded, refused the bill.

Advocator's Authorities.—(2.)—George on Libel, 150, 164, 166.; Starkie, 275.; Holt, 201, 184; Forteith, Nov. 18, 1819, (F. C.)

W. SMITH,—W. BELL, W. S.—Agents.

A. STEVENS, Pursuer.—*Jameson—Ja. Macdonald.*
R. G. BURDEN, Defender.—*Moncrieff—Burn Murdoch.*

No. 495.

Nov. 21, 1823.

FIRST DIVISION.
Lord Meadowbank.
S.

Expenses—Liability for qua Dominus Litis—Parent and Child—Aliment.—Stevens was employed, as a law agent, by Ann Macdonald, to raise an action of declarator of marriage against the eldest son of the defender. He accordingly did so, and obtained decree, with expenses. He then brought the present action against the defender for payment of these expenses, on the ground, 1. That he had agreed to defend the process, provided the son should compromise an action of aliment for £.30 yearly; that this aliment was inadequate

Defender's Authorities.—Balf. 152; 3. Mack. 3. 4; 1. St. 18. 3; 4. St. 40. 33; M'Gill, July 4, 1716, (1783); Tersie, Feb. 22, 1711, (Ib.)

J. SOMMERVILLE,—S. C. SOMERVILLE, W. S.—Agents.

No. 497. G. PANTON, Boxmaster of the Guildry of Cupar-Fife, Pursuer.—*Dean of Faculty Cranstoun—Forsyth.*

R. ROBERTSON and Others, Deacons of the Trades of Cupar-Fife, Defenders.—*Jeffrey—Rutherfurd.*

Nov. 21, 1823.

FIRST DIVISION. Lord Alloway. H.

Exclusive Privilege—Burgh Royal.—A dispute having arisen between the Guildry and Incorporated Trades of Cupar-Fife, relative to their respective privileges, an action of declarator was brought by the former to have them ascertained. They there concluded to have it found, that the Guildry had the exclusive right to import and sell within the burgh all articles manufactured by others; that the Trades had no right to import such articles, either from England or any other place, nor to sell them within the burgh; and that they had merely the privilege of importing the rude materials necessary for their respective crafts, and to sell the articles which were manufactured by themselves. In defence, it was pleaded by the Trades, that although the Guildry had a right of general importation and sale, yet, 1. That by law, and by the practice of the burgh, each of the trades was entitled to import and sell articles manufactured at home or abroad by others which were of the same description as those of their respective crafts, or accessary to them; and, 2.

A. SOMMERVILLE, Pursuer.—*Fullerton.*
A. SMITH, Defender.—*Cuninghame—Graham Bell.*

No. 496.

Nov. 21, 1823.

FIRST DIVISION.
Lord Meadowbank.
H.

Bona fide Payment.—Frame held a tenement in Edinburgh, in feu from Carnegie, at a duty of £.1 : 9 : 2. He subfeued it for payment of the same duty to the ancestor of the defender Smith. On Frame's death, the tenement and the mid-superiority were taken possession of by Dr. Hepburne, as heir-at-law. He resided in London, and never made up a feudal title; but the rents and feu-duties were drawn by his sisters on his behalf, through the means of their agent. Smith and his predecessor had regularly paid the feu-duty to the agent from 1791 till 1820. In the meanwhile, (1817,) a competition having arisen with a third party, for one half of the property, Sommerville was appointed judicial factor to recover the rents. Dr. Hepburne died without completing a title; and his heir and the competitor having agreed to sell the property and divide the price, it was bought by Smith. An action was then raised by Sommerville against him, for arrears of feu-duty from 1812. In defence he pleaded bona fide payment to Dr. Hepburne. To this Sommerville answered, 1. That the payment had been made not to him, but to his sisters, who had no colourable title; and, 2. That Dr Hepburne had made up no titles to the mid-superiority. The Lord Ordinary decerned in terms of the libel; but the Court unanimously altered, and assoilzied Smith.

sented a complaint to the Dean of Guild against Robertson, a member of the Corporation of Smiths, for dealing in articles which were not of his own manufacture. He objected to the jurisdiction; but this defence was repelled. In an advocation, the Lord Ordinary sustained the objection, and dismissed the action, 'in respect it 'was competent for the pursuer to have brought 'this action, which involves a question as to the 'interest and jurisdiction of the Guildry, before 'the Magistrates of the burgh;' and he refused a representation, in respect 'it appears, that for 'some time there have been various disputes be-'twixt the Guildry and the Incorporated Trades 'of Cupar, with regard to their respective pri-'vileges; and in determining questions of this kind 'the jurisdiction of the Dean of Guild and of his 'Council was liable to the strongest objections, 'when they had so decided an interest, both as a 'corporation and as individuals, to support their 'own privileges; and this question could have 'been so easily avoided, by trying the question 'before either the Magistrates or the Sheriff, 'which were much more competent jurisdictions 'for this purpose.' The Court adhered.

Advocator's Authorities.—Inverness, June 14, 1667; Lord Kintore, Feb. 27, 1802, (7673); Mack. Obs. 1593, c. 180; 1. Ersk. 4, 24; 4. Bank. 20.

Respondent's Authorities.—1593, c. 180, P. F. of Paisley, Feb. 17, 1761, (1956); Davidson, June 14, 1667, (1983); Dunbar, July 17, 1706, (3422.).

J. & C. NAIRNE, W. S.—TOD & WRIGHT, W. S.—Agents.

C. Tod, Petitioner.—*Ivory.* No. 499.
A. M'Nab, Respondent.—*A. M'Neill.*

Inhibition, Recall of.—M'Nab having raised an action against Tod, concluding for £.500 of damages, and £.300 as expenses, executed letters of inhibition on the dependence. On Tod's application the Court recalled the inhibition, on finding caution for the restricted sum of £.200.

Nov. 21, 1823.
SECOND DIVISION
M'K.

A. Forsyth & G. M'Dougall.—Geo. Logan, W. S.—Agents.

Culcreuch Cotton Company, Advocators.— No. 500.
Moncrieff—Ivory—Spiers.
D. Mathie, Respondent.—*Forsyth.*

Cautioner.—The affairs of J. and D. M'Gown, merchants in Glasgow, having become embarrassed, they made an offer, at a meeting of their creditors in March 1816, if allowed time, to pay their debts by instalments at six, twelve, and fifteen months; and Mathie at that meeting granted a missive, whereby, 'in the event of Messrs J. and 'D. M'Gown obtaining the assent of their cre-'ditors' to this arrangement, he 'promised and 'engaged to guarantee' the payment of the third instalment. To this arrangement, the Culcreuch Cotton Company acceded, and in the May following received instalment bills from the bankrupts at six, twelve, and fifteen months' date. At the same time Mathie delivered to a clerk, sent by the company, an ex facie unconditional letter of gua-

Nov. 21, 1823.
SECOND DIVISION
Lord Pitmilly.
M'K.

rantee for the payment of the last instalment bill. Many creditors having refused to accede, the bankrupts applied for a sequestration, which was accordingly awarded before the first set of instalment bills became due. None of the instalments having been paid, the Culcreuch Company raised action before the Magistrates of Glasgow, against Mathie, on his unconditional letter of guarantee. He pleaded, that this letter was merely in implement of his conditional guarantee at the meeting in March, which had become null by the non-accession of the creditors; and so the Magistrates found, and assoilzied him accordingly. The Culcreuch Cotton Company brought an advocation, and contended, that the letter must be held to have been a separate and unconditional guarantee, granted after the general and conditional guarantee had proved ineffectual by the non-accession of the creditors. The Lord Ordinary remitted simpliciter, and the Court adhered.

GIBSON, CHRISTIE & WARDLAW, W. S.—G. NAPIER,—Agents.

No. 501. SIR MICHAEL MALCOLM, Pursuer.—*Dean of Faculty Cranstoun—H. J. Robertson.*
DOWAGER LADY MALCOLM, Defender.—*Moncrieff—Dundas.*

Nov. 21, 1823.

SECOND DIVISION Lord Kinedder. B.

Locality Entail.—The entail of the estate of Balbedie empowered the heirs of tailzie 'to provide their husbands and wives in suitable life-rents by way of locality, not exceeding the half

' of the present rent of the estate for the time;' and also to provide certain sums to their younger children; for payment of which latter provisions, it was declared that they might sell parts of the entailed estate. The late Sir John Malcolm, possessing under this entail, in 1800 granted to his wife, Lady Malcolm, (the defender,) a bond of locality of certain parts of the entailed property, the rent of which at that time did not exceed the half of the yearly rental, and infeftment was taken. At the time of Sir John's death, the rent of the locality lands exceeded the half of the rental of the estate, partly from the greater increase of the rent of the locality lands, and partly from the sale of part of the estate, to pay the provisions of the younger children, and to redeem the land-tax. Sir Michael, his son and heir, thereon raised action against Lady Malcolm, to have her locality provision reduced, or at least restricted; and contended, that she was only entitled to a provision equal to one-half of the rental as at the death of the granter, and that she ought to bear part of the burden of the provisions to the younger children, and of the redemption of the land-tax. It was answered for Lady Malcolm, that she was infeft in certain lands, which at the date of the bond of locality were under one-half of the then rental; that as she would have suffered without relief had they fallen in value, she was entitled to the benefit of the increase of rent, and that the entail laid no part of the burden of the children's provisions on her; but she agreed to pay the land-tax effeiring to her locality lands. The Lord Or-

dinary having reported the case, the Court assoilzied her.

The Court were of opinion, that if the locality was in terms of the provision of the entail as at the date of granting, it could not be affected by any subsequent alteration in value even though occurring before infeftment.

Pursuer's Authorities.—Mackgill, June 13, 1798, (15451); Duchess of Roxburghe, Jan. 11, 1820, (F. C.).
Defender's Authorities.—2. Ersk. 9, 41; Agnew v. Agnew, reported in a note to case of Gordon, Jan. 24, 1811, (F. C.); Lord Kintore, May 13, 1814, (F. C.).

A. Stevenson, W. S.—J. Taylor,—Agents.

No. 502. G. Williamson, Pursuer.—*Skene—Currie.*
J. Forbes, Defender.—*Cuninghame.*

Nov. 22, 1823. First Division. D.

Cessio.—Decree of cessio was here opposed on an allegation of a fraudulent abstraction of effects; but satisfactory proof not having been brought, the Court decerned.

W. Gardner, W. S.—J. J. Fraser, W. S.—Agents.

No. 503. Trustees of the late Earl of Aberdeen, Pursuers.—*Ro. Bell.*
The Right Hon. W. Dundas and W. H. Nisbet, Defenders.—*Boswell.*

Nov. 22, 1823. First Division. Lord Alloway. D.

Expenses.—The case, ante, Vol. I. No. 188. having returned to the Lord Ordinary, he decerned against the defenders for expenses; and the Court adhered.

J. Thomson, W. S.—A. Wishart, W. S.—Agents.

A. STEWART, Advocator.—*Buchanan.* No. 504.
L. JUDD, Respondent.—*Jeffrey—Gillies.*

Principal and Agent.—Judd raised an action against Stewart, a horse-dealer, for £. 27, as the price of a horse, which he alleged he had entrusted to Stewart to sell for him, and which Stewart had shortly afterwards sold at that price. In defence Stewart averred, that Judd had sold the horse to him for £. 15. The Sheriff allowed a proof; on advising which, he decerned against Stewart, who advocated. The Lord Ordinary assoilzied Stewart; but the Court being satisfied by the proof that the horse had been merely put under Stewart's charge on sale, altered, and found that he must account to Judd for the price of the horse, under a reasonable deduction for keep and commission.

Nov. 22, 1823.
SECOND DIVISION
Lord Cringletie.
F.

A. CROMBIE, W. S.—H. G. DICKSON,—Agents.

CAMPBELL, FRASER & Co. Pursuers.—*Cuninghame.* No. 505.
A. SHEPPERD, Trustee on the Sequestrated Estate of John Fraser, Defender.—*Jeffrey—Matheson.*

Reference to Oath.—This was a reference of the case, ante, Vol. II. No. 330, to the oath of Fraser the bankrupt, on whose sequestrated estate the defender was trustee. The Court refused it as incompetent.

Nov. 22. 1823.
SECOND DIVISION
F.

CAMPBELL & CLASON, W. S.—T. MACKENZIE, W. S.—Agents.

No. 506. JEAN BARR, Advocator.—*Riddell.*
D. SILLAR, Respondent.—*Baird—Aiken.*

Nov. 22, 1823.
SECOND DIVISION
Lord Cringletie.
F.

Expenses.—In an advocation of a judgment of the Sheriff of Ayr, the Lord Ordinary remitted to the Sheriff to recall his interlocutor finding no expenses due. Barr having reclaimed, the Court altered, and found her entitled to expenses.

D. M. BLACK, W. S.—HUNTER, CAMPBELL, & CATHCART, W. S.—Agents.

No. 507. GRAY CAMPBELL.—*Solicitor-General Hope.*
J. M'HARDY.—*Macdonald.*
Competing.

Nov. 25, 1823.
FIRST DIVISION.
Lord Alloway.
S.

Competition—Arrestment.—The Norwich Insurance Company being indebted to Hogg, M'Hardy, one of his creditors, arrested in their hands on the 14th of March 1822. Thereafter, on the 16th of April, the Insurance Company paid the debt to Hogg, and received a discharge. Hogg had at this time incurred an arrear to the Excise; and on the 5th of May, Campbell, on behalf of the Crown, arrested in the hands of the Insurance Company. A process of forthcoming and multiplepoinding having been brought, Campbell contended, that as the Company had illegally paid the money to Hogg, it must be held to be still in their hands; and that as his arrestment was prior to judgment being obtained by M'Hardy, he, as in right of the Crown, was preferable. To this it was answered by M'Hardy,

that as there were no funds in the hands of the Company at the date of Campbell's arrestment, it was inept. The Lord Ordinary sustained that objection, and found, that although the Company were liable to M'Hardy in damages for breach of arrestment, yet this could not be available to the Crown, whose diligence had not been used till after the debt was paid and discharged. The Court refused a petition, without answers.

Campbell's Authorities.—33. Henry VIII. c. 39. § 74; 4. Anne, c. 7; 6. An. c. 26. § 6; Com. of Excise, Jan. 1724, (7873.); Ogilvie, June 29, 1691, (385.); Robertson, July 6, 1802, (7891.); 2. Bell, 64.

D. Horne, W. S.—C. Gordon, W. S.—Agents.

J. Rankine, Pursuer.—*Cuninghame.*
R. M'Laren and Others, Defenders.—*Baird.*

No. 508.

Nov. 25, 1823.

First Division. S.

Cessio.—Rankine, after having been incarcerated by M'Laren for three months, was liberated in respect of the irregularity of the diligence. He then brought a process of cessio; against which it was objected, 1. That as, (according to his own plea,) the imprisonment was illegal, he could not found on it as entitling him to pursue this process; 2. That the executions against the defenders designed them only in reference to the summons; 3. That he had been sequestrated in 1809, and ought to produce a certificate from his trustee; and, 4. That he had not made a full surrender. It was answered, that the executions were written on the back of the summons, in which the parties were fully designed; that the pursuer had got a cessio posterior to the seques-

tration, and that the present debts did not fall under the cognisance of the trustee. The Court repelled the objections; and being satisfied that the allegation of concealment was not well founded, decerned in the cessio.

GREIG & PEDDIE, W. S.—D. GREIG, W. S.—Agents.

No. 509. ERIC, LORD REAY, Pursuer.—*Dean of Faculty Cranstoun—Moncrieff—Ro. Bell.*
MAJOR MACKAY and Others, Defenders.—*Solicitor-General Hope—Baird—Jeffrey.*

Nov. 25, 1823.
FIRST DIVISION.
Lord Alloway.
S.

Entail—Title to pursue—Prescription—Reserved Power—Double Title.—George, Lord Reay, was proprietor in fee-simple of the estate of Reay. In August 1732, when his eldest son Donald was about to be married to Mrs Marion Dalrymple, a contract of marriage was executed, by which Lord Reay disponed the estate to himself in liferent, to his son in fee, and to the heirs-male to be procreated of the marriage; whom failing, to a series of substitutes, (one of whom was the father of the pursuer); whom all failing, to his son's nearest heirs and assignees whatsoever. This deed was fortified with the usual clauses of a strict entail; but power was reserved by Lord Reay to burden the lands with provisions, to a certain extent, to younger children of the marriage; and to him and his son, 'during their joint 'lifetimes, in their liege poustie, and with mutual 'consent, to alter the course of succession and 'tailzie above mentioned, except in so far as con-

'cerns the provisions to the said Mrs Marion 'Dalrymple, and the heirs and daughters of this 'marriage.' In 1741, and while the above deed remained personal and unrecorded, Lord Reay granted a disposition of the estate to his son, and to the heirs-male of the marriage, and to certain other heirs-male, among whom was the father of the pursuer, and the heirs-male of his body, without any prohibitory, irritant, or resolutive clauses. Fourteen days thereafter, Lord Reay and his son, in virtue of the reserved power, by a separate deed, confirmed this alteration of the entail contained in the contract 1732; and a trust-conveyance of the rents was at the same time executed in favour of certain persons, for payment of debt.

George, Lord Reay, died in 1748, and was succeeded by his son Donald. At this time Donald had two children alive of the marriage, viz. George and Hugh; and in 1750 he took infeftment on the deed 1741, to himself in liferent, and in 1760 to his son George in fee. The sasines were duly recorded; but hitherto no infeftment had been taken on the entail 1732. In 1757 George, with consent of his father Donald, entered into a contract of marriage, by which George disponed the estate to himself and the heirs-male of the marriage; whom failing, to a series of substitutes. One of these substitutes was the pursuer's father, whose right of succession was unfettered. Infeftment was taken on this contract in 1758, and recorded. Thereafter, in 1760, George entered into a second marriage; on which occasion a similar contract was executed.

Donald, Lord Reay, died in 1761, and was succeeded by his son George, who now became Lord Reay. Being displeased with the trust-conveyance of the rents, he resolved to revive the entail 1732, which had been destroyed; and for that purpose raised a summons of proving, and obtained a decree of its tenor. This decree he recorded in the register of entails, and in 1768 expede a general service as heir-male and of provision to his father Donald, under the entail 1732. He died soon thereafter, without issue, and was succeeded by his brother Hugh, a lunatic, who, by his tutors, was served heir-male and of provision, and was infeft in 1769. This was the first sasine which had been taken on the entail, and in 1778 it was confirmed by the superior. Hugh died in 1797, and with him the heirs of the marriage called by the entail 1732 became extinct. He was succeeded by the pursuer, who was the eldest son of the third son of George, Lord Reay, by whom the entail 1732 had been made. Being ignorant (as he alleged) of the deed 1741, he made up titles, by precept of clare constat, as heir of entail to Hugh, and was infeft in 1797. Thereafter, having discovered the deed 1741, he raised an action of declarator against the other heirs of entail, to have it found, 1. That he was entitled, in virtue of his infeftment, to possess the estate in fee-simple, in consequence of the fetters having been removed from all the substitutes in the entail 1732 (with the exception of the heirs of the marriage) by the deed 1741; or, 2. That at least he had a right to make up titles to Donald, Lord Reay, or

to his son George, who possessed under unlimited infeftments, and so to enjoy the estate in fee-simple.

Against this action, Major Mackay, and the other heirs of entail, pleaded, 1. That the pursuer had no title to pursue, as he was not connected with the deeds founded on; 2. That the deed 1741 was unwarranted, as the reserved power only entitled to alter the substitution of heirs, and not to destroy the entail; 3. That George, Lord Reay, the maker of the entail, having reduced himself to a liferenter, could not affect the fee; 4. That by the decree of proving the tenor, and by the service of George (second,) the entail 1732 was completely revived; and, 5. That the entail so revived was perfected by the positive and negative prescriptions. The Lord Ordinary found; 1. That the pursuer had a sufficient interest and title to insist in the action, in order to ascertain the precise situation in which he stood with regard to his estate; 2. That the 'deed 1741, upon which 'infeftment followed, was a complete alteration 'of the entail contained in the contract of mar-'riage 1732, in terms of the reserved power of 'revocation and alteration therein contained, in 'so far as related to all the heirs in that tailzie, 'who were not heirs-male procreated of that mar-'riage;' 3. 'That George (second,) Lord Reay, 'and Hugh, Lord Reay, were both of them heirs-'male of the contract of marriage in 1732, and 'that they were, of course, bound, by the express 'terms of that contract, which had been redinte-'grated; but that the redintegration of that con-

'tract of marriage could not affect the deed 1741, 'and the infeftments following thereon, which had 'not been reduced except with regard to the heirs-'male of the marriage;' 4. 'That the pursuer, 'having all the rights in his person as heir under 'the contract 1782, as well as under the deed '1741, and the contracts of marriage in 1757 and '1760, his making up his titles under the one deed 'did not exclude him from making up his titles 'under the other deed if he thought fit; and that 'having all these titles in his person, by the re-'peated decisions of this Court, he cannot be bar-'red, either by the positive or negative prescrip-'tion, from founding upon them; and therefore 'found, that as the pursuer is not an heir of the 'marriage with Marion Dalrymple, he is not pre-'vented from making up his titles under the deed '1741, or any of the other deeds to which he has 'right.' On these grounds, his Lordship decern-ed in terms of the second alternative conclusion, and the Court adhered.

Pursuer's Authorities.—Porterfield, May 15, 1821, (ante, Vol. I. No. 5.); 2. Ersk. 1, 30; Smith, June 30, 1752, (10303); Durham, Nov. 24, 1802, (11220); Welsh, June 21, 1815, (F. C.); Lumsden, June 15, 1811, (F. C.); Buchanan's Trustees, Mar. 4, 1823, (F. C.)

Defender's Authorities.—(2.)—Campbell, June 17, 1746, (15505); Nisbet, Nov. 16, 1763, (15516); Stewart, July 8, 1789, (15535); 3. Ersk. 8, 21.

Corrie & Welsh, W. S.—W. Dickson, W. S.—Agents.

R. R. HEPBURN, Pursuer.—*Gillies.*
DUKE OF GORDON, Defender.—*Robertson.*

No. 510.

Nov. 25, 1823.

SECOND DIVISION
Lord Cringletie.
M'K.

Commonty—Bounding Charter.—Hepburn was proprietor of the barony of Rickarton, the charter of which described the lands, 'cum omnibus 'communitatibus, partibus, pendiculis et pertinentiis earundem,' as lying within the parish of Fetteresso. Having enjoyed possession, along with the Duke of Gordon and other conterminous heritors, of a commonty, lying partly in that, and partly in other adjacent parishes, he raised an action of division. The Duke of Gordon objected to Hepburn's title to pursue a division of the commonty lying beyond the parish of Fetteresso; and contended, that his charter, being a bounding charter, he could not acquire a right of common property beyond the parish of Fetteresso, although he might acquire a right of servitude. The Lord Ordinary sustained Hepburn's title 'only to the extent of dividing the commonty 'libelled, in so far as it lies within the parish of 'Fetteresso;' and the Court refused a reclaiming petition, without answers.

J. KER, W. S.—J. S. ROBERTSON, W. S.—Agents.

No. 511. J. BUCHAN, Advocator.—*Dean of Faculty Cranstoun—Skene.*

MRS CARMICHAEL, Respondent.—*Fullerton.*

Nov. 25, 1823.

SECOND DIVISION Lord Cringletie. M'K.

Property—Sign-Board—Acquiescence.—Buchanan was proprietor of an inn in Lanark, the only entry to which was by a close passing through a tenement belonging to Mrs Carmichael, on which his sign-board had been fixed for the period of thirteen years. Mrs Carmichael having removed it, he applied to the Dean of Guild to grant warrant to replace it, which was refused, in respect that he did not found his right either upon a written title or upon possession for forty years. He then brought an advocation, founding on the acquiescence for thirteen years, and contending, that the removal of the board by Mrs Carmichael was merely in æmulationem, she having a much larger sign-board of her own on the house. The Lord Ordinary remitted simpliciter, and the Court refused a petition, without answers.

J. SWAN, W. S.—J. SOMERVILLE Jun.—Agents.

No. 512. A. B. Petitioner.

Nov. 26, 1823.

FIRST DIVISION. D.

Sequestration—Bankrupt—Clergyman.—This was an application by a clergyman of the Church of Scotland, as printer, publisher and stationer, for a sequestration under the bankrupt act. He had also been engaged as editor of a provincial newspaper. The Court awarded sequestration.

Although the Judges were satisfied, that they were bound to award the sequestration, they considered the practice of clergymen devoting themselves to such occupations to be so improper, that they remitted the petition to the Procurator of the Church, to be laid before the ecclesiastical courts.

EARL OF ABERDEEN, Pursuer.—*Solicitor-General Hope—Rutherfurd.* No. 513.

J. LAIRD, Defender.—*Moncrieff—D. M'Farlane.*

Mutual Contract—Tutor-Dative.—In December 1817, Laird and certain other persons entered into verbal bargains with the Commissioner of the late Marquis of Abercorn, to feu parts of the estate of Paisley, subject to the approbation of his Lordship. The Marquis approved, in writing, of the transaction; but before the charter was executed he died. He was succeeded by the present Marquis, a minor, to whom the Earl of Aberdeen was appointed tutor-dative. Thereafter, in March 1819, Laird renewed his offer, provided that the tutor-dative was in a condition, before Whitsunday 1820, to grant feu-charters. The other persons having also renewed their offers, it was arranged that an action should be brought in name of one of them, concluding for implement of the bargain made with him. The true object of this action was to ascertain the powers of the Earl of Aberdeen; and the Court, on the 7th of December 1819, found that he was 'bound to implement the 'bargain entered into by the deceased Marquis.' Laird having refused to implement his offer, an

Nov. 26, 1823.

FIRST DIVISION. Lord Alloway. H.

action of declarator, to have it found that he was bound to perform his part, and to ordain him to do so accordingly, was raised against him. In defence, he pleaded, 1. That the original offer, being verbal, was not binding, and the renewed one had never been accepted; 2. That the latter was qualified with the provision, that the tutor-dative should be in a condition, at Whitsunday 1820, to execute feu-charters; but that no measures had been taken to have that ascertained, so far as related to this particular case. The Lord Ordinary decerned in terms of the libel, in respect that a valid agreement took place between the parties, provided it was found that the tutor was bound to give effect to the original transaction,—that it was proved that it had been agreed that the decision of the Court as to his authority was to regulate the whole feus; and that it had been found, prior to Whitsunday 1820, that the tutor was bound to implement. The Court adhered.

J. & C. Nairne, W. S.—C. & F. Orr, W. S.—Agents.

No. 514.

Mrs Graham, Pursuer.—*Cuninghame—J. W. Dickson.*

Mrs and Miss Orr, Defenders.—*Dean of Faculty Cranstoun—Dunlop.*

Nov. 26, 1823.

First Division. Lord Meadowbank.

D

Passive Title.—The late J. Orr died possessed of funds in this country, which were not adequate to pay his debts, and of an estate in the island of Tobago, which he disponed mortis causa to a natural son. The defenders were confirmed executors

cum beneficio inventarii, and exhausted the funds in Scotland in payment of debts. Over the Tobago estate, a Mr Turner had a mortgage; and when he was about to enforce it, an arrangement was made, by which it was conveyed to him absolutely, on condition of paying to the defenders a small annuity during their lives. The pursuer, being a creditor of Mr Orr, brought an action against them, concluding for a count and reckoning of his means, and particularly of their intromissions with the Tobago estate. They stated, that the funds in Scotland were exhausted, (which was admitted,) and denied any intromission with the estate in Tobago. The Lord Ordinary, before answer, ordained them to give in a state generally of their intromissions. But the Court altered this interlocutor, and found it unnecessary for the defenders to give in this state, 'in respect it is 'admitted, that the intromissions with the effects of the late Mr Orr situated in Scotland 'proceeded by virtue of a confirmation before 'the Commissaries, and that the same have been 'more than exhausted, by payment made to the 'creditors of the deceased; and further, in respect 'it is not alleged, that the petitioners (defenders) 'have had any other intromission with the estates 'of the said John Orr, situated in the West Indies, 'except what may be held to arise in consequence 'of the settlement with Mr Turner of London; 'but remit to the Lord Ordinary to hear parties 'upon the question, how far the petitioners have 'subjected themselves, or become liable in payment of the claims of the respondent, by and in

'consequence of the said settlement so made 'with Mr Turner.'

J. Lang, W. S.—G. Dunlop, W. S.—Agents.

No. 515. J. Carmichael, Pursuer.—*Dickson—Moncrieff.* Lieutenant-Colonel Erskine, Defender.—*Dean of Faculty Cranstoun—Gillies.*

Nov. 26, 1823.

Second Division. Lord Pitmilly. B.

Pactum Illicitum—Sale of Army Commission.—Carmichael, a captain in the 53d Foot, had obtained his commissions of ensign and lieutenant without purchase, and had acquired his captaincy by payment of the regulated difference. In 1803, he sold his commission to the late Henry Erskine, the defender's brother, then a lieutenant in the same regiment, for £. 1500, of which £. 1000 were paid down, and a bond granted for the remaining £. 500. By the Army regulations of that period, an officer in such circumstances was not allowed to sell his commission as a captain for more than £. 950; and both he and the purchaser were bound to declare, on honour, that they had adhered to this rule. After Henry Erskine's death, Carmichael raised action against his brother and representative, Colonel Erskine, for payment of the bond. He defended, on the ground that the sale, being contrary to the Army regulations, was a pactum illicitum, and that although he represented his brother, who had been a party to this transaction, yet in turpi causa melior est conditio possidentis. The Lord Ordina-

ry assoilzied Colonel Erskine, and the Court adhered.

ANDREW STEELE, W. S.—J. B. FRASER,—Agents.

J. CHALMERS, Pursuer.—*Graham Bell.* No. 516.
R. DUNCAN, Defender.—*J. Wilson junior.*

Expenses.—Chalmers pursued Duncan for payment of feu-duties. The Lord Ordinary decerned against Duncan, but found no expenses due. The Court altered, and allowed expenses, subject to modification.

Nov. 26, 1823.
SECOND DIVISION
Lord Cringletie.
M'K.

J. CHALMERS, W. S.—D. BRASHE,—Agents.

GUILDRY of STIRLING, Advocators.—*Forsyth.* No. 517.
JOHN WEIR, Respondent.—*More.*

Exclusive Privilege—Burgh Royal—Schoolmasters.—The Guildry of Stirling presented a complaint to the Magistrates against Weir, a schoolmaster, stating that, although he was not entered with any of the corporations, nor was a burgess, yet that he was in the practice of selling books within the burgh which were not written by himself; and concluding against him for fine and interdict. His defence was, that he did not keep a shop, nor sell books to the public generally, but that he merely supplied to his scholars the books which were necessary for their education. The Magistrates assoilzied him, 'in respect it is not 'alleged that the defender keeps any shop or 'stall, or sells books to the public within the

Nov. 27, 1823.
FIRST DIVISION.
Bill-Chamber.
Lord Hermand.
H.

burgh, but confines himself to supplying books to his own scholars. The Lord Ordinary and the Court refused a bill of advocation.

Advocator's Authorities.—Stat. 1457, and 1466; Kames Stat. Law, voce Burgh Royal; 1672, c. 5.

D. Fisher,—W. Dymock, W.S.—Agents.

No. 518.

General Simson's Trustees, Pursuers.—*L'Amy.*
T. Henderson, Defender.—*Matheson.*

Nov. 27, 1823.

First Division. Lord Meadowbank. H.

Interest.—Henderson was tenant of a farm belonging to General Simson, by the lease of which he was bound duly to inclose, divide, and in general to improve it. In 1801, three years prior to its expiration, General Simson presented a summary application to the Sheriff, for a remit to inspectors to report on the state of the farm, and on the damages he had sustained; but there was no prayer for decree. Each of the inspectors gave in separate reports; and the Sheriff, in February 1805, found a certain sum of damages due, but refused to decern for it, in respect there was no conclusion. A summons was then raised and repeated, but no decree was pronounced. Henderson having presented a bill of advocation, Lord Mathven, in July 1805, refused it, but remitted to find a smaller sum due. The Court, however, after opposition from General Simson, altered, and remitted with instructions to appoint new inspectors. Some of them having declined to act, certain others were named, in July 1806. From that

time till 1815, the process lay in the hands of Henderson's agent, but General Simson made no attempt either to recover or to waken it. In September 1815, a summons of wakening was brought by him; but one of the inspectors being dead, and the others declining to act, the case was advocated; and in February 1821, Lord Gillies and the Court decerned for a specific sum of damages, as the average result of the former reports. A question having then arisen relative to interest, Lord Meadowbank found it due from July 1805, the date of Lord Methven's interlocutor; but the Court altered, and found Henderson liable in interest only from September 1815.

Pursuers' Authorities.—Henry, Feb. 15, 1801, (No. 1. ap. Ins. Rent); Crawford, May 16, 1812, (F. C.); Black, July 9, 1812, (F. C.)
Defender's Authorities.—Lord Justice-Clerk, Jan. 1666, (1753); Grant, Feb. 9, 1765, (1760); Lawrie, June 21, 1769, (1764); Traill, July 6, 1810, (F. C.); Warner, May 29, 1813, (F. C.); Campbell, Mar. 8, 1803, (No. 1. ap. An. Rent.)

R. Rutherford, W. S.—W. Clark, W. S.—Agents.

Mrs Mouat and Husband, Pursuers.—*Matheson.* J. Bremner, and Mrs Clarke, Defenders.—*Baird—Greenshields—Scott Moncrieff.*

No. 519.

Nov. 27, 1823.

Second Division. Lord Cringletie. M'K.

This was an action of accounting by Mrs Mouat, for rents drawn by Bremner, as her tutor and curator, and against Clarke, as representing a factor appointed by Bremner. The latter pleaded, that his accounts had been examined and discharged; and Clarke, that the factor had duly accounted to

his constituent. The Lord Ordinary and the Court, being satisfied that the defences were well founded, assoilzied.

G. Veitch, W. S.—Bremner & Finlayson, W. S.—W. Drysdale, W. S.—Agents.

No. 520.

J. Calder, Suspender.—*Menzies.*
S. W. Driver, Charger.—*Solicitor-General Hope—More.*

Nov. 28, 1823.
First Division.
Lord Meadowbank.
D.

Reference to Oath.—This was a question in a suspension of a bill of exchange, relative to the import of a reference to oath. The Lord Ordinary suspended the letters; but the Court altered, and found them orderly proceeded, under deduction of a sum originally admitted to have been paid.

D. Horne, W. S.—R. Rattray, W. S.—Agents.

No. 521.

G. Ewing, Suspender.—*Maidment.*
Dr Hare and J. Glasgow, Chargers.—*Solicitor-General Hope—Marshall.*

Nov. 28, 1823.
First Division.
Bill-Chamber.
Lord Alloway.
D.

Process—Mandate—Bill-Chamber.—Hare and Glasgow obtained decree against Ewing, on which they raised diligence. He presented a bill of suspension, on the ground that, during the course of the action, Hare had gone to India; that no mandatary had been sisted for him; and that Glasgow had died. It was answered for Hare, that he was the proprietor of an heritable estate in

Scotland; that his wife and family resided there; and that although he had gone abroad after the action was raised, he was not bound to sist a mandatary. The Lord Ordinary refused the bill, in respect that Hare 'is a considerable landed proprietor in this country; that the action had been commenced before he left this country; that so soon as it was objected that there was no mandate, a regular commission was produced;' and that the death of Glasgow did not prevent Hare from recovering the sum due to him; and he found Ewing liable in expenses. The Court ordered a report from the Deputy-Keeper of the Signet, 'stating the practice as to issuing hornings, or other diligences, from the Signet, at the instance of landed proprietors who happen at the time to be furth of Scotland, but who have gone out of the country after the commencement of the previous proceeding upon which such diligence has issued; and whether the same proceeded in the name of the said proprietors alone, or with the concurrence of a mandatary or factor.' He having reported that the general, although not universal practice was to issue diligence without such concurrence whether the party was in Scotland or not prior to raising the action, the Court adhered, so far as regarded Hare, but passed the bill quoad Glasgow. Nothing having been said as to expenses, and it being ascertained, contrary to what had been supposed, that the adherence to the interlocutor of the Lord Ordinary in the Bill-Chamber did not carry them, the Court, after their interlocutor was final, on the motion of Hare, 'in respect of an omission,' found him entitled to

the additional expenses. Ewing maintained, and maintained, that this notification was incompetent; but the Court adhered.

Suspender's Authorities.—Stuart, Feb. 3, 1681, (353.); Candlemakers of Canongate, July 7, 1809, (F. C.); Falconer, Mar. 4, 1815, (F. C.) *Chargers' Authorities.*—Gray, June 5, 1741, (11986); Hope, June 10, 1797, (4646.)

D. Brashe,—W. Horn,—A. Manners, W. S.—Agents.

No. 522.

T. Pattison, Suspender.—*Jameson.*
J. Fitzgerald and Others, Chargers.—*Solicitor-General Hope—Rutherfurd.*

Nov. 28, 1823.

Second Division
Lord Pitmilly.
F.

Interdict—Process—Expenses.—The Officers of the Burgh Court of Glasgow, in an action against certain individuals for breach of their privileges in executing writs issuing from the Burgh Court, had obtained an interdict against these persons, and 'all others executing such writs in time to come.' Pattison, who had not been a party to the former action, having executed a Burgh Court writ, Fitzgerald and others, Officers of the Court, presented an application to the Magistrates, founding solely on the previous interdict, and praying to impose a fine on Pattison, as guilty of a breach of it, and of new to interdict him and all others. The Magistrates having decerned against Pattison, he brought a suspension, on the ground that, not being one of the individuals against whom the interdict had been granted, it was incompetent to charge him with a breach of it. The Lord Ordinary, 'in respect the original application to

the Magistrates was incompetent,' suspended simpliciter, and the Court adhered, with expenses.

There was a difference of opinion among the Judges as to the expenses; but the majority were of opinion, that wherever an action was incompetent, expenses ought to follow of course.

C. Fisher,—A. Robertson, W. S.—Agents.

Mary Hunter, Advocator.—*Tawse.*
J. Hogg, Respondent.—*Lumsden.*

No. 523.

Principal and Agent.—Hunter raised action against Hogg, a shipmaster, to account for the value of certain straw hats which he had sent under his care to America. The sole question was, whether he was bound, under his instructions, to sell them himself, or put them into the hands of agents for Hunter's behoof. The inferior court, finding the latter established, assoilzied; and the Lord Ordinary and Court refused a bill of advocation.

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First Division.
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Lord M'Kenzie.
S.

J. Hunter, W. S.—J. & W. Jollie, W. S.—Agents.

J. Hunter, Pursuer.—*Ro. Bell—Aiken.*
T. Dodds, Defender.—*Moncrieff—Graham Bell.*

No. 524.

Jury Court—Process.—In an action of division of a commonty, a proof was allowed, taken, and reported. Dodds claimed certain parts as his exclusive property; but the Lord Ordinary repelled

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D.

his claim. Having petitioned, the Court, without allowing an answer, altered; remitted the case to the Jury Court; and ordered the proof to be cancelled, except so far as regarded the evidence of witnesses who were dead. Hunter reclaimed, and contended, that he was entitled to see and answer the petition, and that the remit and order for cancellation of the proof were incompetent. The Court adhered, except as to the order for cancellation, which they recalled.

Pursuer's Authorities.—55. Geo. III. c. 52. § 1.; 59. Geo. III. c. 35. § 6.

Defender's Authorities.—59. Geo. III. c. 35. § 4. 6. 7. 14.; 1. Ersk. 2. 8.; 2. Hume, 89. 366.

HUNTER, CAMPBELL & CATHCART, W. S.—MILLER, TURNBULL & BROWN, W. S.—Agents.

No. 525. J. RANKINE, Suspender.—*Cuninghame—Neaves.*
R. M'LAREN, Charger.—*Moncrieff—J. Miller jun.*

Nov. 29, 1823.

SECOND DIVISION Bill-Chamber. Lord Pitmilly. F.

Process.—Bill-Chamber.—A bill of suspension by Rankine was passed on caution, on the 1st August 1823. The period for finding caution expired on the 15th; on which day, without obtaining a sist, or offering a second bill, Rankine boxed a petition, complaining of the order for caution. M'Laren then applied for a certificate of no caution, but the clerk declined to issue it in respect of the petition. When it was moved on the 12th November, M'Laren objected that it was incompetent, as Rankine ought to have presented a second bill, or at least should have got a sist.

To this it was answered, that as no execution had taken place, the petition was competent. The Court repelled the objection; but on the merits adhered to the Lord Ordinary's interlocutor.

The Court were unanimously of opinion, that the boxing of the petition on the 15th August could not stay diligence; but that as no execution had taken place, and the petition had been lodged before the expiry of the four first sederunt-days, it was competent.

Suspender's Authorities.—A. S. June 14, 1799, § 7; Taylor, Jan. 19, 1822; (ante, Vol. I. No. 293, note.)

Greig & Peddie, W. S.—D. Grieg, W. S.—Agents.

W. Watson and Others, and W. Jeffrey, Trustee for M'Arthur's Creditors, Advocators. — *Forsyth.*
W. Brown and Others, Respondents.—*Jeffrey.*

No. 526.

Nov. 29, 1823.

Second Division. Bill-Chamber. Lord Bannatyne.

Trustee.—This was a question relative to some additional claims made by Brown, &c. against M'Arthur's Trustees, of exactly the same description as those which formed the subject of dispute in the case between the same parties, ante, Vol. I. No. 129. The Judge-Admiral, as in that case, decerned against Watson personally, on the same ground as in the former case, and against Jeffrey also personally, on the ground that the resignation of the trusteeship by Watson, and the election of Jeffrey, had been collusive, and for the purpose of screening the former from the consequences of

his conduct; and the Court, on report of the Lord Ordinary, refused a bill of advocation.

D. FISHER,—J. GEMMELL,—Agents.

No. 527. R. GRAHAM, Pursuer.—*Corbet—Moncrieff.* GENERAL SHARPE and Others, Defenders.—*Dean of Faculty Cranstoun—Buchanan.*

Nov. 29, 1823.

SECOND DIVISION Lord Pitmilly. M'K.

Public Road.—In 1818, Graham permitted a road to be made through part of his property, which from that time was possessed by the public, and repaired by the Trustees. In 1821, he, with the view of shutting it up, built a wall across it, which the Trustees caused to be removed. He then brought an action of damages against them, alleging that he had agreed to allow the road to be opened only on certain conditions; but that as these had not been complied with, he was entitled to shut it up. To this it was answered, that he had no right to do so brevi manu, and that they were therefore justified in ordering the wall to be removed. The Lord Ordinary and the Court sustained the defences.

JOHNSTON & LITTLE,—M'KENZIE & SHARPE, W. S.—Agents.

J. Alexander and R. Baird, Pursuers.—*Sir J. Connell.*
W. Ford and Cautioners, Defenders.—*Matheson—Brownlee.*

No. 528

Nov. 29. 1823.

Second Division
Lord Cringletie.
M'K.

Caution judicio sisti.—William Ford having been incarcerated by the pursuers, two of his creditors, as in meditatione fugæ, was liberated on his brother James, with Monro and Philips as attestors, granting a bond of caution de judicio sisti. The pursuers, within the stipulated period, raised action against William Ford, in May 1820, and after some litigation obtained decree against him in July 1822. Immediately on this decree becoming final, they gave in a minute, praying for an order on the cautioners to produce Ford at the bar, which was granted, and repeatedly renewed; and on the failure of the cautioners to comply with it, the Lord Ordinary declared the bond of caution forfeited, and decerned against them. They reclaimed, on the ground of mora by the pursuers in requiring the presentment of Ford. It was answered, 1. That it was sufficient to call for presentment at any time before expiry of the period for extracting decree, and, 2. That, at any rate, the cautioners having allowed the order for presentment to become final, were barred of this plea. The Court adhered.

Pursuers' Authorities.—Brown, June 24, 1790, (2059); Cowan, Nov. 28, 1797, (2061); Stewart, July 8, 1809, (F. C.)

——— J. Graham, W. S. Agents.

No. 529. WINTERBOTTOM, BUCKLEY & Co. Pursuers. *Christison.*
J. WRIGHT, Defender. *M'Farlane.*

Dec. 1, 1823.

FIRST DIVISION. Lord Meadowbank. D.

Messenger's Responsibility.—On the 12th February 1822, the pursuers raised letters of horning against Wilson of St Andrew's, and by means of their agent sent them, on the same day, to the defender, a messenger in that town, for immediate execution. He executed them on the 13th, but dated his execution on the 12th, and did not return them till the 25th. In consequence of being sent by a carrier, it was alleged that they were not received till the 1st of March. On the 4th they were sent back to the defender to correct the execution, with a notice that he was held liable for the debt. Being absent from home, he did not get them till the 4th, and he returned them with a corrected execution on the 6th. Diligence had in the meantime been raised against Wilson by other creditors; and the pursuers wrote to him on the 15th, threatening instantly to take out a caption if payment were not instantly made. The caption, however, was not expede till the 23d, on which day it was sent to the defender, with orders to execute it if the money were not remitted within two days; but reserving the liability of the defender. Wilson having kept in hiding, the caption could not be executed, although several searches were made for him. On the 11th of April the agent for the pursuers wrote to the defender stating, that if he consented, they

would take Wilson's bill, with security, at three months, for the debt. This could not be got, and on the 27th of April his estates were sequestrated. On the 29th the letters of horning were sent to the defender, with orders to execute a poinding, which was done, and on the 27th of May Wilson was apprehended, but was relieved in consequence of a personal protection. The pursuers then raised action for payment of the debt against the defender and his cautioners, founding on his repeated delays in the various stages of the proceedings. In defence he maintained, that he had executed the letters of horning on receiving them, and that the delay in apprehending Wilson arose chiefly from the conduct of the pursuers themselves, and partly from the debtor being in hiding. The Lord Ordinary assoilzied; and the Court, on a view of the whole circumstances and the correspondence, refused a petition.

Pursuers' Authorities.—Miller, July 10, 1810, (F. C.); Dougan, July 5, 1817, (F. C.)

W. Dickson junior, W. S.—Tod & Wright, W. S.—Agents.

ANN PLOWMAN, Pursuer.—*C. D. Riddell.*
A. KEITH, Defender.—*Solicitor-General Hope.*

No. 530.

Dec. 1, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Poor's Roll—Process.—Plowman, after having been irregularly admitted to the poor's roll, raised an action against Keith. Instead of applying to the Inner-House to have the privilege recalled, Keith stated the objection of irregularity to the Lord Ordinary, and pleaded the case on the me-

rits. The Lord Ordinary decerned in terms of the libel. In reclaiming against this judgment, Keith insisted that Plowman should be struck off the roll, and the action dismissed. But the Court, holding that he ought, before entering on the merits, to have applied to the Court for this purpose, and that the objection was now too late, refused his prayer.

N. W. ROBERTSON,—D. CLYNE,—Agents.

No. 531.

J. ROBERTSON, Pursuer.—*Baird.*
MARY M'CAIG and Others, Defenders.—*Gillies.*

Dec. 1, 1823.

FIRST DIVISION. Lord M'Kenzie. S.

Writ—Subscription of Witnesses—Deathbed.—The late Alexander Robertson, at the age of eighty-one, executed a disposition and deed of settlement of his heritable property, in favour partly of the pursuer, his eldest son, and partly of M'Caig and others. He died thirty-eight days thereafter; and the pursuer being displeased with the deed, brought an action of reduction, on the head, 1. That it was not duly tested; and, 2. That it had been made on deathbed. From a proof it appeared, as to the first point, that the subscribing witnesses had signed at the request of the deceased, but not at one and the same time. With regard to the second, it was established, that the deceased had been afflicted with 'a 'stuffing' and cough; that for some time he had a swelled leg, which required him to have support; that for the 'stuffing' he had been occasionally bled by a farrier, (there being no medi-

cal men in the neighbourhood); that although not regularly confined to bed, or to the house, his general health was infirm; and that he died in the act of stepping out of his bed. But there was no distinct evidence that the stuffing, cough, or swelled leg existed within sixty days before, or were the cause of his death. The Lord Ordinary assoilzied the defender, and the Court adhered.

On the first point the Judges were unanimously of opinion, that it is not necessary that a deed be subscribed by the witnesses at one and the same time. As to the second, the majority held that no fixed disease within sixty days had been proved; and that unless this were established by clear evidence, the deed must be supported. Lord Gillies, however, stated, that in a similar case, Dr Gregory and another medical gentleman had reported to him as Ordinary, that death is seldom or ever caused by old age of itself, but results from being combined with disease; that here a disease of a nature dangerous to a man in advanced life had been proved; and that as there was no evidence that it had been removed, it must be held to have continued till the day of his death. He was therefore for altering the interlocutor.

Pursuer's Authorities.—(2.)—3. St. 4. 28; 3. Ersk. 8. 96; 1. Dict. 217-19.

Defenders' Authorities.—(2.)—2. Cullen's Prac. of Physic; 1696, c. 4.; 3. Ersk. 896.

J. R. Skinner, W. S.—A. Macallan,—Agents.

No. 532. Mrs Hay, Pursuer.—*Marshall.*
W. Horn, Defender.—*Jardine.*

Dec. 1, 1823.
First Division.
Lord Alloway.
H.

Bill of Exchange—Proof.—A lease of the bleachfield of Clerksmill, including machinery, was granted by the late Mr Hay to Horn from Candlemas 1821; and it was agreed that the moveable utensils should be given at a valuation. On the 4th of June 1821, Horn granted his bill for £.60, 'for value of utensils, &c. at Clerksmill,' which was retired. Mr Hay having died, his widow, as executrix and liferentrix, raised action for payment of the first year's rent. Horn alleged payment, and produced in evidence the above bill, which he stated had been granted not for the utensils, but for rent. This he offered to instruct by production of an instrument of valuation, and by the testimony of the valuators. The Lord Ordinary repelled the defence; and the Court, considering the proof inadmissible to contradict the terms of the bill, adhered.

Pursuer's Authorities.—Bruce, June 19, 1696, (12329); D. of Hamilton, Dec. 9, 1762, (12350); Wilson, Feb. 26, 1787, (12353); Wallace, Nov. 29, 1793, (1484); Cowan and Sons, Dec. 19, 1816, (F. C.)

D. & A. Thomson, W. S.—J. Lyon,—Agents.

No. 533. A. Bell, Advocator.—*J. Henderson junior.*
J. Geikie, Respondent.—*Gillies.*

Dec. 2, 1823.
Second Division.
Lord Cringletie.
M'K.

Bill of Exchange.—Bell raised action before the Sheriff of Forfar for payment of a promissory-note granted by Geikie, who alleged no value.

Bell contended that this defence could be proved only by his writ or oath; but the Sheriff, 'in the 'circumstances of the case,' held that unnecessary, and assoilzied Geikie. Bell having brought an advocation, the Lord Ordinary appointed Geikie 'to give in a condescendence of the special 'facts he proposes to refer to the oath of the ad- 'vocator.' Geikie reclaimed, but the Court adhered.

RAMSAY & IMRIE, W. S.— J. RAMSAY,—Agents.

A. STEELE, W. S.—*Forsyth.*
The EXECUTORS of the late DAVID MARTIN.—
Solicitor-General Hope—Jameson.

No. 534.

Dec. 2, 1823.

SECOND DIVISION
Lord Cringletie.
B.

Multiplepoinding.—The Lord Ordinary dismissed, as unnecessary, a process of multiplepoinding raised by Steele, on the grounds that there was no double distress, and that the fund was held by him merely as agent for the late David Martin, whose representatives had raised an action of count and reckoning against him, in which all questions between them might be settled; and the Court adhered.

W. FERGUSON, W. S.—A. GREIG, W. S.—Agents.

No. 535. J. SMITH, Suspender.—*Dean of Faculty Cranstoun —Walker.*

S. DAVIDSON, Charger.—*Bell—Ivory.*

Dec. 3, 1823.

FIRST DIVISION. Bill-Chamber. Lord M'Kenzie. H.

Cautioner in a Sequestration.—Smith, cautioner in a composition under the bankrupt act, having been charged by Davidson, a creditor, for payment, presented a bill of suspension on caution, alleging, that in the list of debts exhibited to the creditors by the bankrupt, on the faith of which he became cautioner, this claim was not included; that it was not due; and that it was prescribed. It appeared, however, that the debt had been ranked pending the sequestration; had been inserted in the petition for approval of the composition; and that diligence had been done, by which the plea of prescription was obviated. The Lord Ordinary refused the bill, and the Court adhered.

The Judges were of opinion, that as the ranking had never been challenged during the sequestration, and the bond of caution had been granted in reference to this as well as the other debts, it would be productive of most injurious consequences to suspend a charge for payment.

Suspender's Authority.—2. Bell, 498.
Charger's Authorities.—2. Bell, 498; Brown, Feb. 11, 1809, (F. C.)

J. JAMIESON,—INGLIS & WEIR, W. S.—Agents.

Fox Maule, Petitioner.—*Dean of Faculty Cranstoun—Cockburn.*
Hon. W. Maule, Respondent.—*Moncrieff—Murray.* No. 536.

Execution pending appeal.—The Court granted interim execution on caution, pending the appeal of the case, Vol. II. No. 452.

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H.

J. F. Gordon, W. S.—Fotheringham & Lindsay, W. S.—Agents.

John Wood and Others, Pursuers.—*Baird.*
Mrs Fairley and her Son, Defenders.—*Moncrieff—Jameson.* No. 537.

Marriage-Contract.—Some time prior to 1781, James Miller, then a domestic servant, was married to Christian Wood, with whom it was alleged he received £.100. During the marriage, Miller purchased a house and piece of ground; and on the 18th of May 1784, the spouses having no children, executed a mutual disposition and settlement, by which, 'to prevent all debates amongst our relations at the dissolution of our marriage,' they disponed to themselves, 'and to the survivor or longest liver of us, and to the heirs or assignees of the survivor of us, under the burden of the predeceaser's debts, and declarations after mentioned,' the whole property of every description, presently, or which shall, at the dissolution of our marriage, be pertaining and belonging to us, or either of us;' and, in particular, Miller did

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First Division.
Lord Alloway.
D.

thereby 'assign and dispone to himself, and the 'said Christian Wood, my spouse, and to the sur- 'vivor and longer liver of us, and the heirs or 'assignees of the survivors of us, under the bur- 'den foresaid,' the house and piece of ground. There was reserved to Miller, during his life, 'full power to transact and manage the affairs of 'us, the said spouses, to sell, dispose of, or con- 'tract debt upon the lot or piece of ground above 'disponed, and other subjects above conveyed, 'at my pleasure, as I shall see necessary or pro- 'per for our mutual interest, without the consent 'of the said Christian Wood had thereto.' But it was declared, 'that after the death of the sur- 'vivor and longest liver of us, his or her heirs 'and executors shall be obliged to pay to the 'heirs, executors, *or* assignees of the predecease[r] 'of us the just and equal half of the overplus 'value of whatever part of the subjects above 'conveyed may remain free and undisposed of at 'that time, after deduction of the debts and fu- 'neral charges, and the expense of making up 'titles to such of the said subjects as may then re- 'main free or not disposed of, and all necessary 'charges thereanent.'

Christian Wood died in 1809, at which time the goods in communion were said to be worth £1500, and the heritable property £140. Soon thereafter, Miller married the defender, Mrs. Fair- ley, and in 1820 (at which time they had a son,) they executed a postnuptial contract, by which he disponed to his son in fee the whole property of which he should die possessed, and particularly

the house and piece of ground, of which he gave the liferent to his wife, and assigned to her an annuity of £20 and his furniture. On this deed infeftment was taken. Miller having died, the pursuers, as the executors of Christian Wood, founding on the obligation in the first contract, raised an action against Mrs Fairley and her son, as representing Miller, to account for the one half of the free residue of his property at his death; and they brought a reduction of the second contract. In defence it was maintained, that the first contract was gratuitous on the part of Miller,—that the whole property was destined to the survivor, reserving power to Miller to dispose of it at his pleasure, who was thus the unlimited liar,—that the clause founded on was merely an eventual destination of what might remain undisposed of at the death of the survivor; and that this destination was completely evacuated by the second contract, which was an onerous deed. The pursuers did not dispute that Mrs Fairley was entitled to a reasonable provision, and the Lord Ordinary found, 'that if Christian Wood had predeceased her husband without issue, the one half of the whole 'goods in communion must immediately upon 'that event have been transmitted to the pursuers 'as her next of kin: that the postnuptial contract of marriage betwixt James Miller and 'Christian Wood was a fair and an onerous deed, 'by which it was provided that the whole property, heritable and moveable, should be enjoyed 'by the survivor, but under the obligation, 'that 'after the death of the survivor and longest liver

'of us, his and her heirs and executors shall be 'obliged to pay to the heirs, executors, or assig- 'nees of the predeceaser of us, the just and equal 'half of the overplus value of whatever part of 'the subjects above conveyed may remain free 'and undisposed of at that time, after deduction 'of the debts and funeral charges of us, and each 'of us, and the expenses of making up titles to 'such of the said subjects as may then remain 'free or not disposed of, and all necessary charges 'thereanent:' that this marriage was dissolved by 'the predecease of Christian Wood, and that the 'survivor, James Miller, had right to the whole 'subjects, both heritable and moveable, during 'his life: that the obligation or condition in the 'contract of marriage did not take effect until his 'death, in 1820: that although this obligation 'might have been defeated by James Miller's 'onerous deeds, yet he could not defeat that one- 'rous obligation by a gratuitous deed, but that 'both the defenders, his widow and son, are liable 'for the implement thereof, in so far as they re- 'present him; therefore appoints the defenders 'to lodge a condescendence of all the property 'and effects which belonged to the late James 'Miller and his first spouse at the death of Chris- 'tian Wood, and what part thereof remained at 'his own death.' The Court adhered.

The Judges unanimously agreed, that the rationes were well founded.

Pursuers' Authorities.—3. Ersk. 8. 42; 4. Ersk. 1. 28, 29, 34; Laws, Jan. 19, 1697, (4236); White, Dec. 9, 1630, (4199); Shaw, June 1687, (4235); Purdie, Mar. 5, 1707, (4238); 3. St. 5. 52.
Defenders' Authorities.—3. St. 5. 18; 2. St. 3. 41; Steven, Feb. 1, 1809; (F. C.).

HUNTER, CAMPBELL & CATHCART, W. S.—C. FISHER,—Agents.

W. ROBERTSON, Petitioner.—*Forsyth.* No. 538.
D. MORRISON and Others, Trustees for Turnbull's Creditors, Respondents.—*More.*

Dec. 4, 1823.

SECOND DIVISION B.

Execution pending Appeal—Trustee.—This was an application for execution as to expenses, pending appeal of the case, ante, Vol. II. No. 347. The respondents contended, that execution could pass against them only qua trustees, and that as such they had no funds. It was answered, that they had been pursuers in the action, and were not entitled to put the petitioner to the expense of defending himself, if they had not funds to secure payment of his expenses. The Court granted execution against the trustees personally, in common form.

R. CARGILL, W. S.—A. PATERSON,—Agents.

No. 539.

J. HUNTER, Advocator.—*J. W. Dickson.*
J. BONAR, Respondent.—*Cockburn—*
J. Wilson junior.

Dec. 4, 1823.

SECOND DIVISION
Bill-Chamber.
Lord Gillies.
M'K.

Sale—Expenses.—Hunter sold to Bonar some boxes of soap, as of a certain weight, per an accompanying invoice, the price of which, on the supposition that the weight was correct, amounted to £.26 : 0 : 4. Hunter having drawn and sent a bill for this sum, Bonar alleging a slight deficiency of weight, which created a difference of 2s. 4d., accepted it for £.25, 18s. only. Hunter refused the bill, and raised action before the Sheriff for the full amount, and for the value of the stamp of the bill. In support of this action, he alleged that Bonar had agreed to take the soap at the weight of the invoice. The Sheriff, on advising a proof, decerned against Bonar for the full sum of £.26 : 0 : 4, but did not find him liable in expenses, or the value of the stamp. Hunter presented a bill of advocation. The Lord Ordinary refused the bill; and the Court, being satisfied by the proof, that it was the custom of the trade for soap-dealers to guarantee the weight specified in the invoice, and that there was no evidence of Bonar's having agreed to take the soap in question as of the invoice weight, refused a reclaiming petition, with expenses.

J. YOUNG,—D. BRASHE,—Agents.

S. WOOD, Pursuer.—*Solicitor-General Hope—Menzies.*
M. DALRYMPLE, Defender.—*Dean of Faculty Cranstoun—Jameson.*

No. 540.

Process—Summons.—Wood, a creditor of Hope, raised action against Dalrymple, concluding for reduction, under the acts 1696, c. 5., and 1621, c. 18., of indorsations of certain bills, and for repetition of cash payments made by Hope to him. It was objected to the relevancy of the summons, that although the pursuer libelled in general terms on Hope's insolvency, yet he did not distinctly state that he was bankrupt or insolvent at the date of making the indorsations and payments, or any facts from which this could properly be inferred. The Lord Ordinary having dismissed the action, Wood reclaimed, praying at least to be allowed to raise a supplementary action. The Court adhered, reserving to him, however, to bring a new action.

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SECOND DIVISION
Lord Mackenzie.
B.

Pursuer's Authority.—Scott, July 2, 1622, (ante, Vol. I. No. 585.)

D. HORNE, W. S.—RUSSELL, ANDERSON & TOD, W. S.—Agents.

KIRK-SESSION of RUTHWELL.—*Henderson.*
KIRK-SESSION of ST MUNGO.—*Ro. Bell.*

No. 541.

Expenses.—This was a question relative to expenses, arising out of the case, ante, Vol. I. No. 299., which see. The Court had assoilzied

Dec. 5, 1823.

FIRST DIVISION.
Lord Alloway.
S.

Ruthwell from the claim made against it, but remitted to the Lord Ordinary to proceed farther in the conjoined actions. The Kirk-Session of St Mungo had been called in relief by Ruthwell; and having claimed expenses, the Lord Ordinary decerned for them. Against this Ruthwell reclaimed, alleging, that having been finally assoilzied, the decree was incompetent. But the Court, holding that St Mungo ought not to have been called, adhered.

R. RUTHERFORD, W. S.—W. MARTIN, W. S.—*Agents.*

No. 542.

H. BARR, Pursuer.—*D. M'Farlane.*
J. HAMILTON, Defender.—*Menzies.*

Dec. 5, 1823.

SECOND DIVISION
Lord Pitmilly.
F.

Reduction—Removing—Prescription.—Fallow, the proprietor of a small tenement in Kilmarnock, granted in 1770 an heritable bond over it to one Patton, who was infeft, and got possession of the subjects, which he retained till his death in 1780. Hamilton thereafter acquired right to this bond, but made up a defective title, on which, however, he entered into possession of the subjects, and laid out a considerable sum in rebuilding the tenement after its destruction by fire. In 1811, Barr, (who had acquired right to the property of the subjects,) raised action of declarator, removing, and count and reckoning, against Hamilton, who, in 1813, made up new titles. Of these Barr brought a reduction, on the grounds that the bond was extinguished, 1. By the negative prescription; and, 2. By Hamilton's intromissions with the rents.

On the other hand, Hamilton raised reduction of Barr's titles. These actions were conjoined, and the Lord Ordinary assoilzied Barr, and decerned against Hamilton, both in the reduction and removing at Barr's instance, upon the latter 'finding caution to the defender for whatever sums 'may be found to be a debt on the subjects in 'question, and due to him.' Hamilton reclaimed, and contended, 1. That the negative prescription could not apply to his bond, as Patton, the original creditor, had been infeft, and had possessed till 1780, and he had made up titles to Patton, and been infeft in 1813, within the years of prescription; 2. That the amount of his intromissions must be ascertained in the count and reckoning before the bond could be held to be discharged; and, 3. That he was entitled to retain possession till he received actual payment of the debt in his bond, and the sums expended in ameliorations on the property. The Court recalled the Lord Ordinary's interlocutor, in so far as it decerned in the reduction at Barr's instance, but adhered as to the absolvitor of Barr, and the decree of removing at his instance.

Pursuer's Authorities.—(1.)—3. Erk. 7, 8; 1617, c. 12.

Greig & Peddie, W. S.—A. Robertson, W. S.—Agents.

No. 543. SIR J. W. M'KENZIE, Pursuer.—*Dean of Faculty Cranstoun—Forbes.*
MAGISTRATES of FORTROSE, Defenders.—*Jeffrey—Matheson.*

Dec. 5, 1823.
SECOND DIVISION
Lord Pitmilly.
F.

Commonty.—In the process of division of Millbuie Common, the Commissioner appointed to take the proof, in his report allotted to the Burgh of Fortrose, (which had a right of servitude over the common,) an extent of property corresponding to the proven value of the servitude. The Burgh objected to this report, and contended, that they were entitled to the property of the extent over which they had exercised their right of servitude. The Lord Ordinary approved of the report, and the Court adhered.

W. M'KENZIE, W. S.—T. M'KENZIE, W. S.—Agents.

No. 544. COLONEL STEWART, Pursuer.—*M'Neill—Menzies.*
R. STEWART, Defender.—*Forsyth.*

Dec. 5, 1823.
SECOND DIVISION
Lord Cringletie.
B.

Qualified Oath—Sexennial Prescription.—Colonel Stewart pursued Robert Stewart, as the only surviving partner of Stewart, Campbell & Co. for payment of a promissory-note granted in 1800. The defender having pleaded the sexennial prescription, the pursuer referred resting owing to his oath. He admitted the constitution of the debt; that it stood in the books of the Company at the credit of the pursuer; that he had never paid the debt; that he did not know that any of

his partners had ever paid it; that no claim had ever been made against him by any of them as having done so; that one of them had, at the dissolution of the Company, undertaken to collect the funds of the Company, and to pay a composition on their debts; but he did not know that he had done so. The Lord Ordinary found that the oath did not prove the debt to be resting owing, and assoilzied the defender. But the Court altered, and decerned in terms of the libel, reserving (by a majority) to the defender to prove that the debt had been paid by composition.

Pursuer's Authorities.—3. Ersk. 7, 18; Callender, July, 10. 1717 (9416); A. v. B. Feb. 26, 1751, (12475); Campbell, May 19, 1797, (1638); Hardie v. Bowat, July 9, 1805, (not rep.).

Defender's Authorities.—3, Ersk. 7, 18; Cheap, Nov. 30, 1775, (11111); Ross, Nov. 9, 1784, (11115); Douglas, Nov. 18, 1794, (11116); Russel, May 23, 1792, (11130).

A. Forsyth & G. M'Dougall,—R. Rattray, W. S.—Agents.

Lord Dundas, Suspender.—*Jardine.*
R. Wight, (Trustee for Dr Moodie's Creditors), Charger.—*M'Neill—Whigham.*

No. 545.

Dec. 6, 1823.

First Division.
Lord Alloway.
H.

Retention.—The Rev. Dr Moodie obtained decree of cessio in 1819, under condition of assigning to Wight, as trustee for his creditors, one half of his stipend, 'reserving all questions and 'claims among the creditors anent the share of 'stipend surrendered to them.' This assignation was intimated to the different heritors; and to facilitate the levying of the stipend, Dr Moodie

granted to Wight a factory to uplift his share. In 1821 Lord Dundas, one of the heritors, obtained a decree against Dr Moodie, for a debt due prior to the assignation, in payment of which he claimed retention of the share of the stipend due out of his lands. This being resisted by Wight, a suspension was brought by Lord Dundas, in order to try the question.

At this time Wight had recovered from the other heritors a sum sufficient to pay Dr Moodie's alimentary half; but he maintained, 1. That Lord Dundas had no right of retention whatever; or, 2. That at least it must be limited to one half of the stipend payable out of his estate, because the whole stipend due by each heritor suffered, by the decree of cessio, a bipartite division, the one half of which was alimentary, and so not attachable. The Lord Ordinary found, 'in respect 'that it is positively averred by the charger, and 'not distinctly denied by the suspender, that the 'half of Dr Moodie's stipend had not been paid to 'him, that Lord Dundas is not entitled to retain 'any part of that alimentary half, but that his right 'of retention must be confined to the other half 'thereof.' Both parties reclaimed; Wight complaining that retention had to any extent been sustained; and Lord Dundas, that it was not extended to the full stipend in his hands. The petition for Wight was refused without answers, (see ante, Vol. II. No. 308.); but the Court being satisfied that Wight had sufficient funds to pay Dr Moodie's half, and that this was a question between Lord Dundas and the other credi-

tors, sustained his plea of retention, and suspended the letters simpliciter.

Charger's Authorities.—1. Bell, 71, 78, note 8.

J. KERR, W. S.—A. GOLDIE, W. S.—Agents.

J. SHIRLAW, Suspender.—*Gillies.*
J. WILSON, Charger.—*Dickson.*

No. 546.

Dec. 6, 1823.

FIRST DIVISION.
Bill-Chamber.
Lord Alloway.
S.

Removing.—Neilson acquired a lease of a rural subject for 999 years, which he assigned to Gilchrist, who enjoyed possession for several years. By Gilchrist it was assigned to Wilson, who again subset it to Gilchrist. He continued to possess as formerly; and having run in arrear of rent, Wilson brought a process of removing against him on the A. S. 1756. This was opposed by Shirlaw, who made appearance, alleging, that he was the feudal proprietor of the subject; that the lease of Neilson flowed a non habente potestatem; and, consequently, that Wilson had no title to insist. The inferior court decerned in the removing, reserving all questions as to Shirlaw's preferable title; and the Lord Ordinary refused a bill of suspension, 'in respect that, by the Sheriff's interlocutor complained of, the suspender's heritable 'right to the subject is reserved, and may be 'brought forward by him in a competent shape 'whenever he inclines; and that the Sheriff's interlocutor merely applies to the subject under the 'lease, upon which possession has taken place for 'more than seven years.' The Court adhered.

N. W. ROBERTSON,—J. LANG, W. S.—Agents.

No. 547.

W. PETRIE, Pursuer.—*Buchanan.*
A. GEDDES, Defender.—*Hunter.*

Dec. 9, 1823.

FIRST DIVISION.
Lord Meadowbank.

H.

Retention—Lien over Certificate of Registry.—Petrie raised an action of reduction on the act 1696, c. 5., of a vendition of a sloop, granted by Paterson to Geddes on the day previous to his incarceration; and concluding for restitution of the vessel and her appurtenances. In defence, Geddes stated, that on the 16th August 1821, he had lent £.25 to Paterson, who in security delivered to him the certificate of registry of the vessel; that he afterwards advanced a farther sum, relying on the same security; but to enable the vessel to go to sea, he restored the certificate, stipulating for redelivery when she returned to port; that on her return he made a farther advance, when Geddes executed a vendition, and gave back the certificate of registry. He admitted that the vendition was reducible; but he maintained that, by the original transaction, together with possession, he had a lien or right of retention over the certificate, for payment of his debt. To this it was answered, that even if it were true that he had, previous to the sailing of the vessel, been possessed of the certificate, he had given up possession, and so lost his lien; that the certificate had been subsequently delivered to him, not in pledge, but as an accessary of the absolute vendition; and that having therefore lost possession, his lien (even if good in law) had ceased. The Lord Ordinary repelled the defence, and the Court adhered.

Pursuer's Authority.—2. Bell, 98, 99.

Defender's Authorities.—1. St. 13, 21; 1. Bankt. 17, 1; 3, Ersk. 1. 33; 2. Bell, 25, 27, 97; 3. St. 2, 7; Cathcart, June 16, 1781, (8471). Graham, July 14, 1708, (8429); Abbot, p. 26; 1. Holt, 226; 1. Bell, 77, 80; Hubbard, July 2, 1810, (Taunt. 177.); Mestaer, Feb. 9, 1814, (Taunt. 381.); 1. Holt, 319; Mont. on Lien, 46; 2. Bell, 17, 129; 2. East, 523; 7. East, 5; 2. Bell, 101; 1. Cook, 442; Paley, 108; Malcolm, June 24, 1813, (F. C.); Christie, Dec. 14, 1814, (F. C.)

H. M'Queen, W. S.—R. M'Kenzie, W. S.—Agents.

J. Gemmel, Pursuer.—*Skene.*
J. Low, Defender.—*Brodie.*

No. 548.

Dec. 9, 1823.

First Division.
Lord Alloway.

Landlord, and Assignee of Tack.—Gemmel was proprietor of a farm, which had been let for 19 years to Williamson, 'his heirs, successors, and 'assignees whatsoever; but it is hereby declared, 'that the assignees must be approved of by the 'landlord,' or grant an obligation on stamp paper, with security to the satisfaction 'of the landlord' for payment of the rent, and performance of the other obligations contained in the tack, upon their own expenses, within a year after the date of the assignation. Williamson assigned the lease to Low, who was approved of by the landlord, and who subset it to certain subtenants. Some years thereafter Low granted a letter to Raffen, obliging himself to assign the tack to him; but no formal assignation nor intimation was made, and the landlord continued to hold Low liable. An action having been raised against him for payment of arrears of rent, and of damage for miscropping, he pleaded in defence, that although Raffen had not been accepted by the landlord, yet that this

was not essential; that the condition was alternative, either that the landlord's consent should be given, or that the assignee should find security within a year; that the landlord being aware of the obligation to assign, ought to have required security, and by not doing so had passed from that requisite. The Lord Ordinary decerned against him for a part of the rent, in respect that he 'never was relieved of the original obligation 'contained in the lease;' and the Court, holding that it was his duty to have tendered security, refused a petition without answers.

Corrie & Welsh, W. S.—J. R. Stoddart, W. S.—Agents.

No. 549. A. Stewart, Suspender.—*Jeffrey—A. M'Neill.*
Kirk-Session of Gorbals, Chargers.—
Sir J. Connell.

Dec. 9. 1823.

First Division. Bill-Chamber. Lord M'Kenzie. D.

Jurisdiction—Kirk-Session—Beadle.—After the bill of suspension and interdict noticed, ante, Vol. II. No. 176. had been passed, the Kirk-Session cited Stewart to appear before them to answer to a charge, 1. Of having given up lines to the precenter in contradiction to their order; 2. Of refusing to deliver the keys of the church and session-house; and, 3. Of going in and out of a private door during worship. No written charge was served upon him; and he declined the jurisdiction, in respect of the subsisting interdict. The Kirk-Session having proceeded to take a proof, Stewart presented a new bill of suspension and interdict, complaining of the violation of the

former interdict. To this the Kirk-Session answered, that the present accusation against him related to a breach of ecclesiastical duty; that they had not interfered with his civil rights; and that the Court had no jurisdiction in this matter. The Lord Ordinary refused the bill (as explained in a note), because it did not appear 'possible 'for him to suspend the proceedings of an eccle- 'siastical court, on the allegation, that in a mat- 'ter within their competence, they are proceed- 'ing irregularly, and are going to commit wilful 'injustice in their decision. The remedy seems 'to be an application to the superior ecclesiasti- 'cal courts.' But the Court altered, and passed the bill.

Suspender's Authorities.—Burton, May 31, 1819, (Rec. of Gen. Assemb.); Blackst. B. 3. c. 7; 1. Mad. Equity, § 5; 4. Bankt. 22, 1; 1. Ersk. 5, 24; Rutherford, Nov. 17, 1705, (7469.); Dunlop, Dec. 9. 1791, (7470); M'Culloch, Nov. 26, 1793, (7471); Her. of Corstorphine, Mar. 10, 1812, (F. C.)

Charger's Authority.—M'Ewan, Feb. 2, 1810, (not rep.)

J. Baillie,—Murray & Inglis, W. S.—Agents.

W. Ritchie, Pursuer.—*Forsyth—J. Henderson jun.*
Cordiners of Edinburgh, Defenders.—*Moncreiff—More.*

No. 550.

Dec. 9. 1823.

Second Division
Lord Pitmilly.
M'K.

Corporation—Clause.—By the seal of cause of the Incorporation of Cordiners of Edinburgh, it is provided, 'that nane be maid maister of said craft 'except he hath bene a prentece for five zeires,

'and servit ane freeman for meat and fee for 'three zeires thereafter, or else marrit ane burgess 'dochter.' Ritchie, who had married a freeman's daughter, but was himself an unfreeman, and had not served an apprenticeship, claimed to be admitted in virtue of his marriage, which he alleged was equivalent to serving an apprenticeship. The Incorporation refused to do so, because marriage with a freeman's daughter is substituted for the three years' service as a journeyman, but not for the apprenticeship. In an action by Ritchie, the Lord Ordinary assoilzied the Incorporation, and the Court adhered.

D. Scott, W. S.—J. Malcolm,—Agents.

No. 551.

W. Brand, Pursuer.—*Graham Bell.*
J. Barbour, Defender.—*Gillies.*

Dec. 10, 1823.

First Division. Lord Meadowbank.

H.

Title to pursue.—Barbour having, in virtue of diligence against Grahame, poinded certain effects, appearance was made by Brand, who objected that they belonged to him. The Sheriff, after a proof, repelled the objection, and granted warrant of sale. Brodie then brought a reduction of the diligence, and an advocation ob contingentiam. The Lord Ordinary, before answer, granted letters of incident diligence, for recovery of the writs founded on. Barbour reclaimed, maintaining, that as the diligence was not directed against Brand, he had no title to complain; but

the Court, considering that the interlocutor could be productive of no injury to him, adhered.

Defender's Authority.—Burnet, Feb. 18, 1796, (7826).

W. DALRYMPLE,—W. MARTIN,—Agents.

R. URQUHART.—*Hutcheson—J. W. Dickson.*
EARL OF MORAY.—*Dean of Faculty Cranstoun—Forbes.*
Competing.

No. 552.

Dec. 10, 1823.

FIRST DIVISION. Lord Meadowbank. D.

Inhibition of Teinds. — The ancestors of Urquhart were proprietors of Burdsyards, and held leases of the teinds from the Archbishop and Canons of the cathedral kirk of Moray, for payment of a certain tack-duty. On the expiration of these leases, they continued to possess on tacit relocation, and were localled on for the full amount of the tack-duty, which they paid to the minister of the parish. This possession was uninterrupted till 1773, when Lord Moray, on the assumption that he was titular, executed an inhibition against the then proprietor, and in 1776 and 1779 he executed two new inhibitions. None of these were followed by any action till 1783, when a process was raised, concluding for the bygone teinds since 1733, but it was allowed to fall asleep. In 1784, the then proprietor brought a process of valuation and sale of the teinds, in which he obtained decree of valuation in 1785, and of sale in 1788. In

the meanwhile, a competition arose between the Crown and Lord Moray, as to the right of the titularity. While this dispute was depending, the lands of Burdsyards, with the teinds, were sold by Urquhart, and it was agreed that a part of the price should remain in the hands of the purchaser, for relief against any claim for bygone teinds. Lord Moray having been found to be titular, the purchaser brought a multiplepoinding, to be relieved of the price which he held. This was claimed by Lord Moray, on the ground that Urquhart had no effectual right to the teinds; that the leases on which he founded had long ago expired; and that he was liable for the bygone teinds for 39 years prior to the execution of the inhibition in 1776, which his Lordship adopted as the tempus a quo. Against this claim Urquhart maintained various pleas, and particularly that, as his predecessors had possessed bona fide, Lord Moray was not entitled to the bygone teinds prior to the decree of valuation. The Lord Ordinary having reported the case, the Court found, 'that the Earl 'of Moray is only entitled to the teind-duties of 'the lands in question from and after the date of 'the decree in the process of valuation, and to the 'interest accruing upon the price from and after 'the date of the decree in the process of sale.'

Lord Balgray stated, that he was counsel in the case of Lady Grahame,—that although it was tried with a single heritor, it was intended to settle the question with many others, and that it had accordingly been regarded as a solemn decision, on the point.

Urquhart's Authorities.—2. St. 8, 31; 2. Erak. 10, 43; Scott, Feb. 25, 1795, (15700); Lady Grahame, Feb. 20, 1799, (11063).
Earl of Moray's Authorities.—Smith, July 8, 1748, (15660); St. Dec. 695; E. of Selkirk, Dec. 7, 1763, (15824).

J. POTT, W. S.—J. WAUCHOPE, W. S.—Agents.

D. HILL & Others, Suspenders and Pursuers.—*D. M'Farlane—Skene.*
W. FAIRWEATHER & Others, Chargers and Defenders.—*Moncreiff—Jameson—Ivory.*

No. 553.

Dec. 10, 1823.

SECOND DIVISION
Lord Pitmilly.
B.

Corporation.—The nine incorporated trades of Dundee had, for a long period, been formed into a joint body, having a convener and office-bearers separate from those of the individual corporations, and had been in use to meet in a common hall to consult on matters affecting the trades generally. In 1697, a general fund had been established, the administration of which was vested in the convener court, consisting of the nine deacons of the individual trades, and the convener of the nine trades. The constitution of this convener court had been at different times modified and altered; and in 1819 a new set of bye-laws, for the management of the general fund, was proposed to the several corporations; and at a general meeting these bye-laws were adopted by a majority of six trades to three, and also by a majority of the whole aggregate meeting. Hill and others, as representing these three trades, brought a suspension

and interdict against Fairweather and others, the office-bearers of the nine trades, to prevent the new bye-laws being acted on; and raised summons of reduction of them, containing also certain declaratory conclusions. The reasons of reduction and suspension were, 1. That the trades had voted when all assembled together in one hall, instead of each trade in their own private room. 2. That the union of the nine trades composed a fraternity merely, and not an incorporation, and that therefore the consent of each trade was necessary to any change in the bye-laws; And, 3. That these bye-laws were in themselves objectionable. The Lord Ordinary repelled the reasons of suspension, and assoilzied in the action of reduction and declarator; and the Court, 'in respect 'the regulations or bye-laws complained of, ap-'pear to have been adopted by a majority of the 'trades separately, as well as by the aggregate 'meeting, and that they do not appear in them-'selves to be illegal or liable to objection,' adhered, except as to the absolvitor from the declaratory conclusions, as to which they recalled the Lord Ordinary's interlocutor in hoc statu, remitting to his Lordship to hear parties farther thereon, and also on a reserved clause of one of the bye-laws.

Pursuer's Authorities.—Kyd, p. 430, 443; 2. Coke, 360.
Defender's Authorities.—1. Ersk. 7. 64.

T. Meggat, W S.—Ramsay & Imrie, W. S.—Agents.

J. GARDNER, Complainer.—*Solicitor-General Hope—Ivory.*
M. F. CONOLLY and MAGISTRATES of Kilrenny, Respondents.—*M'Neill—H. Bruce.*

No. 554.

Dec. 11, 1823.

FIRST DIVISION. D.

Town-Clerk—Burgh Royal.—Gardner presented a summary petition, stating that, at the late election of the Magistrates of Kilrenny, irregularities had occurred, of which he, as a burgess, meant to complain,—that he had applied to Conolly, the Town-Clerk, for full extracts of the minutes and other proceedings relative to the election, which he had refused, although the full fees had been tendered,—that this demand had been repeated in a notorial protest, and refused—,and therefore praying for warrant against Conolly and the Magistrates, ordaining them to give access to the records, and to furnish extracts. The Court ordered answers within forty-eight hours after service; and these not having been lodged in time, granted commission to the Sheriff of Fife, to inspect the record, and cause extracts to be given. In defence, Conolly and the Magistrates pleaded, that they had delivered such excerpts as were necessary; but the Court found that 'they did 'wrong in refusing to give the petitioner full 'excerpts of the proceedings of the Town-Coun-'cil,' and therefore found them liable in the expenses of process, and of the protest.

R. MACKENZIE, W. S.—J. KERR, W. S.—Agents.

No. 553. J. Gordon and J. Gibson Craig, Pursuers.—*Moncreiff—J. Henderson junior.*
H. Gordon, Defender.—*Dean of Faculty Cranstoun—Gordon—Lumsden.*

Dec. 11, 1823.

First Division. Lord Alloway. H.

Mandatary, Liability of, for Expenses.—An action of reduction of the service of H. Gordon, as heir to an estate, having been brought by J. Gordon, who resided abroad, and Mr Gibson Craig as his mandatary, various proceedings took place. At last Mr Gibson Craig withdrew; and Gordon being unable to obtain any other mandatary, the Court assoilzied the defender, and found Mr Gibson Craig liable in expenses. Having reclaimed against this interlocutor, the Court appointed minutes to be given in as to Mr Gibson Craig's right to carry on the action, to shew that no expenses would have been awarded. In support of this he maintained, that a mandatary in an action being truly a cautioner, was entitled to urge all pleas competent to his constituent, which, in this case, was not excluded by the absolvitor, because it was in absence. To this it was answered, that a mandatary was not a cautioner for performance or payment of that which was concluded for, but was a mere agent, who became responsible for the expenses, in consequence of his constituent being abroad. The Court refused the petition.

It was observed, that after having withdrawn as mandatary, it was impossible that Mr Gibson Craig could be allowed to take up the case as if he were pursuer;

that a mandatary was not a cautioner for the subject-matter of the suit; and that the present case was different from those where an agent was allowed, after gaining the cause for his client, to shew that expenses would be awarded in his favour.

Pursuer's Authorities.—Hope, June 10, 1797, (4646); 1 St. 17, § 9; Fairbairn, Jan. 22, 1629, (14055); Caddell, Jan. 31, 1611, (7787); Arnott, July 9, 1623, (14051); Wylie, June 24, 1642, (7793); Kinghorn, Dec. 11, 1675, (14062); Dick, Mar. 12, 1685, (14064); Hamilton, Dec. 20, 1709, (Ibid.); Hamilton, June 17, 1813, (F. C.); Rox, July 3, 1818, (F. C.); Tod and Wright, Mar. 7, 1822, (ante, Vol. I. No. 484.).

GIBSON, CHRISTIE & WARDLAW, W. S.—J. LYON,—Agents.

R. BRUCE, Pursuer.—*Dean of Faculty Cranstoun —A. Wood.*

A. GRIERSON, Defender.—*Lumsden.*

No. 556.

Dec. 11, 1823.

FIRST DIVISION. Lord Meadowbank. H.

Commonty—Stat. 1695, *c.* 38.—Bruce raised an action, under the act 1695, c. 38, for division of the common of Fitfil-head, situated in the Mainland of Shetland. To this it was inter alia objected, that the action was incompetent, because it is declared by the statute, 'that the interest of the 'heritors having right in the said commonties 'shall be estimate according to the valuation of 'their respective lands or properties,'—that in Shetland there exists no valuation, and that accordingly none of the proprietors have any right as freeholders. Bruce admitted, that there was no valuation, but stated that the lands were divided

into merks, which was substantially a valuation, because the cess and other imposts were levied according to merks. The Court, on the report of the Lord Ordinary, repelled the objection, and found that the division must be regulated by the number of merks belonging to each proprietor.

Their Lordships were of opinion, that the act 1695 was a remedial statute, having been introduced in consequence of the rule of the common law de communi dividundo being inapplicable to heritable subjects; that it was therefore to be liberally interpreted; and that there was nothing to prevent them from adopting the mode of division by merks, according to which the public taxes were raised.

Pursuer's Authorities.—Tennant, Nov. 17, 1738, (2446); Maitland, Aug. 11, 1772, (2485); Campbell, May 17, 1804, (No. 4, ap. Com.)
Defender's Authorities.—3. Ersk. 3, 56 and 58; 1. Bankt. 8, 56; Wight, B. 3, c. 2.

RUSSELL, ANDERSON & TOD, W. S.—A. YOUNGSON, W. S.—Agents.

No. 557.

A. MERCER, Pursuer.—*Moncreiff—M'Neill.*
T. ORR and Others, Defenders.—*Jardine—Marshall.*

Dec. 11, 1823.

SECOND DIVISION
Lord Pitmilly.
F.

Trustee.—M'Culloch executed a trust-disposition of his property, for behoof of his creditors, in favour of Mercer, and to which Orr and others acceded. Under their authority, Mercer instituted a reduction of an heritable bond over a house granted by M'Culloch to Wylie, as in

fraud of his other creditors, and he took other preliminary steps in the management of the bankrupt's funds. Several of M'Culloch's creditors, however, did not accede to this trust; and those who did, shortly afterwards accepted a composition offered by Wylie, discharged M'Culloch, and passed from the action of reduction of Wylie's bond, he agreeing to pay the expenses of the trust. Mercer subsequently, as agent for Wylie, sold the house; and after having unsuccessfully endeavoured to obtain payment of the expenses of the trust from that person, he raised action for them against Orr and others, the acceding creditors. They defended themselves on the ground, that Mercer had not accounted for his intromissions as trustee, and particularly for the price of the house; and they contended, that though the sale was after their acceptance of the composition, he must still be considered as having acted as trustee for them and the other creditors. It was answered for Mercer, that he had received the price of the house as agent for Wylie, the heritable creditor, and that the trust came to an end by all the acceding creditors having accepted the composition and discharged the bankrupt. The Lord Ordinary decerned against Orr, &c. and the Court adhered.

Defender's Authorities.—Ersk. i. 7. 32. & iii. 5, 11; Nicholson, July 23, 1708, (3358); Wallace, Jan. 25, 1717, (3389).

J. Malcolm.—J. & C. Nairne, W. S.—Agents.

No. 558.

D. PITCAIRN, Suspender.—*Matheson.*
J. BROWN, Charger.—*R. Thomson.*

Dec. 12, 1823.

FIRST DIVISION.
Lord Alloway.
H.

Sequestration—Sale.—In 1813, Brown purchased from Pitcairn a quantity of herrings packed in barrels, which he sent to Ireland for sale; but they were returned, as unmarketable, in the end of 1814. Immediately thereafter a sequestration was awarded against Brown, under the bankrupt act; and he was discharged in August 1815, on a composition contract. Pitcairn was ranked as a creditor for £. 150; and, as such, concurred in the discharge. In November of that year, Brown intimated to Pitcairn that he held him liable for the loss on the herrings, and on that account declined to pay the composition. This claim, however, had not been given up by Brown to his creditors, and Pitcairn denied his liability. In March 1819, Pitcairn's estate having also been sequestrated, Brown claimed, and was ranked by the trustee as a creditor for the value of the herrings, and, as such, acceded to a composition contract, in virtue of which Pitcairn was discharged. Brown afterwards gave a charge on the bond for the composition, of which Pitcairn brought a suspension, on the ground that the debt was not due, and had never been constituted by the decree of a Court. The Lord Ordinary suspended the letters, 'in 'respect that the claim upon which the charge 'proceeds is for damages, alleged to have been 'sustained by the charger on a cargo of herrings

'bought from the suspender in 1813, and has ne-
'ver been constituted by the decree of any Court,'
that there was evidence that Brown, prior to the sequestration of Pitcairn's estate, had abandoned the claim; that he had not given it up to his creditors; 'and that, if such an action of 'damages, on account of the insufficiency of her-'rings, could now be brought ten years after the 'sale of that article, all mercantile transactions 'would be rendered quite insecure; and the sus-'pender could have no recourse against the per-'son from whom he bought the herrings, imme-'diately before he sold them to the charger.' Brown reclaimed, contending that the ranking by the trustee was equivalent to a decree; but the Court refused his petition, without answers.

A majority of the Judges were of opinion, that as the sequestration had been concluded by a composition contract before any investigation of the claims, the ranking could not be held as equivalent to a decree so as to foreclose the bankrupt from shewing that the debt was not due.

Charger's Authority.—2. Bell, 498, and case there.

G. Veitch, W. S.—John B. Gracie, W. S.—Agents.

No. 559.

J. MACFARLANE and Others.—*Cuninghame—Cathcart.*

T. CRANSTOUN.—*Cockburn—Anderson.*

Competing.

Dec. 12. 1823.

FIRST DIVISION. Lord Meadowbank.

D.

Competition—Multiplepoinding.—Two actions of multiplepoinding having been brought in 1791 by the creditors of the late Dr Macfarlane, for division of the price of certain property belonging to him, Mr Cranstoun was appointed common agent, and a trust-conveyance was executed by the heir of Dr Macfarlane in his favour of the whole outstanding funds. In virtue of this trust, payments to various creditors were made by Mr Cranstoun; but matters not having been brought to a close, a new action of multiplepoinding, in name of Mr Cranstoun, directed against all those who were known to be creditors, was raised in 1821, by Mr Macfarlane and others, as creditors. Intimations of the existence of this process were made, by order of the Lord Ordinary, in various newspapers; but no new creditors appeared. After some proceedings the Lord Ordinary preferred Mr Macfarlane and others for ought yet seen; but being afterwards of opinion, that as the appointment of Mr Cranstoun, as trustee, was not recalled, he ought to be recognised as in possession of all the rights competent to every individual creditor who did not appear to renounce his claim to the funds, he recalled his former interlocutor,

and sustained the claim of Mr Cranstoun as trustee. But the Court recalled this interlocutor, so far as it sustained Mr Cranstoun's claim as trustee, and remitted, with instructions to ascertain the dividend due to each of the creditors who had not appeared; to appoint it to be lodged in bank; to cause advertisements to be made, requiring all concerned to appear, under certification that these dividends should be distributed among those creditors who had entered claims in the process.

Tod & Wright, W. S.—T. Cranstoun, W. S.—Agents.

Mrs Livingstone, Suspender.—*Neaves.* No. 560.
J. Kennedy, Charger.—*A. M'Neill.*

In this case no general point occurred. The inferior court had decerned against Livingstone for a certain sum of money; and the Lord Ordinary refused a bill of suspension. But the Court remitted with instructions to give credit for £. 5, of the payment of which evidence was produced.

Dec. 13. 1823.
First Division.
Bill-Chamber.
Lord Succoth.
H.

J. Stuart,—R. Kennedy, W. S.—Agents.

T. Robertson, Petitioner.—*Christison.* No. 561.

Judicial Factor.—The Court, on the 24th of January last, authorised the petitioner, the judicial factor on the estate of Kirkmichael, to give a certain deduction to the tenants from their rents and

Dec. 13. 1823.
First Division.
S.

arrears due at Martinmas 1822, (see ante, Vol. II. No. 141): And the present application was made to allow a similar deduction from the rents which had fallen due at Whitsunday and Martinmas 1823. The Court, on considering a report by persons of skill, and no objection being made, granted the prayer of the petition.

W. Renny, W. S.—Agent.

No. 562. Hughes & Duncan, Petitioners.—*Jardine.*
D. Gordon, Respondent.—*A. Bell.*

Dec. 13, 1823.
Second Division
M'K.

Execution pending Appeal — Expenses.—This was an application for execution pending appeal, of the case, ante, Vol. II. No. 206. So far as regarded expenses, Gordon contended, that having been one of two defenders, the other of whom had been assoilzied, he could only be liable for one-half of them. The Auditor had struck off all the expenses which applied solely to the other defender; and had reported, that the remaining expense would have been the same had Gordon been the sole defender. The Court granted execution for the principal sum, and also for the expenses, as reported by the Auditor.

W. Dickson, W. S.—V. Hathorn, W. S.—Agents.

A. THOMSON, and POLLOCK & FALCONER, Advocators.—*Jameson.*
T. HARVIE, Respondent.—*Marshall.*

No. 563.

Lease—Tacit Relocation—Warning—Expenses.—Thomson let a piece of ground to Harvie for three years, from Whitsunday 1819. At the expiry of that period, in 1822, no warning having been given, Harvie continued to possess by tacit relocation, and subset the ground, for one year till Whitsunday 1823, to Macfarlane, who immediately again subset it to Pollock and Falconer. These subtenants were not recognised by the landlord, and they paid their rents to the principal tacksman. Before Whitsunday 1823, Thomson warned Pollock and Falconer to remove, but gave no warning to Harvie, the principal tenant, and thereafter granted a new lease, at an advanced rent, to Pollock and Falconer, who continued in possession after Whitsunday on that title. Harvie brought an action of removing before the Magistrates of Glasgow, who decerned against Pollock and Falconer. They and Thomson presented a bill of advocation, and contended, that warning to the actual possessor was sufficient to prevent tacit relocation. The Lord Ordinary refused the bill; but without any finding as to expenses. Both parties reclaimed. The Court adhered on the merits, and found expenses due.

Dec. 13, 1823.

SECOND DIVISION
Bill-Chamber.
Lord Robertson.
B.

The Court were clearly of opinion, that, as Harvie continued bound to the landlord, the latter could not

be free, and that the principal tacksman was entitled to warning.

Advocates' Authorities.—2. Stair, 2, 23; 2. Ersk. 6, 66; Richard, Jan. 30, 1663, (13812).

Respondent's Authorities.—Ross, p. 65; Bell on Leases, 471; Laing, 1565, (13807); Johnston, Dec. 2, 1629, (13809); Lockhart, Jan. 18, 1745, (13814); Duke of Queensberry, July 7, 1819, (F. C.).

G. M'Dowall,—M'Millan & Grant, W. S.—Agents.

No. 564.

R. Calder, Suspender.—*Greenshields.*
W. Gray and Others, Chargers.—*Moncreiff—Ivory.*

Dec. 16, 1823.

First Division. Bill-Chamber. Lord Meadowbank. H.

Trust—Power of Sale.—Calder, the proprietor of an heritable estate, over which he had granted heritable bonds, with powers of sale, to the extent of about £. 9000, having become embarrassed, executed a disposition in favour of Gray and others, as trustees, to sell the estate, in such lots, and at such prices, as to them should seem eligible. The proceeds were to be applied in payment of the expense of the trust, and of the debts owing by him, according to their respective preferences; and authority was given, if necessary, to borrow money for the purposes of the trust. Several of the heritable creditors having threatened to attach the estate, the trustees, to prevent the loss which would thus arise, borrowed £. 7500 on assignations to the heritable debts, (which were paid off with this money,) and their own personal credit. The estate was then expo-

and by them to sale, under articles of roup subscribed by Calder himself, first at £. 14,900, and then at £. 12,500. No offer having been made, it was again exposed at £. 10,950. Against this sale Calder presented a bill of suspension and interdict, on the ground, 1. That the trustees were not entitled to sell more than was adequate to pay the difference between the sum borrowed and those debts which existed at the date of the trust; and, 2. That he had brought an action of count and reckoning, in which it would be shown that their accounts were incorrect. The Lord Ordinary passed the bill on caution; but the Court unanimously altered, and remitted with instructions to refuse it.

MACK & WOTHERSPOON, W. S.—MACMILLAN & GRANT, W. S.—Agents.

J. C. MOORE, Pursuer.—*A. Wood.*
JEAN BODDAN, Defender.—*C. D. Riddell.*

No. 565.

Dec. 16, 1823.

FIRST DIVISION. Lord Meadowbank. H.

Lease.—On the 8th of August 1796, the Earl of Galloway granted a lease of a farm to Alexander Boddan, for 21 years; 'and after the expiration of the said 21 years, during all the days and 'years of your own natural life, and the life of 'your oldest daughter Sarah Boddan, and longest 'liver of you two, in case you, or either of you, 'shall survive the space of 21 years.' Boddan enjoyed possession till February 1822, when he died. By mistake Sarah, (who predeceased her

father) had been described as his eldest daughter, whereas Jean was truly so. Mr Moore having acquired the property, brought an action of removing against the widow of Boddan, and his two daughters, Jean and Mary. The Lord Ordinary decerned in the removing against the widow and Mary; found that the lease must be held to have been granted in favour of the eldest daughter, in the event of her surviving her father; but that it was incumbent on Jean to instruct that she was entitled to that character. This fact having been admitted by Moore, the Lord Ordinary, in explanation of his previous interlocutor, found, that Jean was 'only entitled to one-third of the lease 'libelled on, during her lifetime.' But the Court unanimously altered, and found that she was entitled to the possession of the whole farm.

R. Rutherford, W. S.—R. Urquhart, W. S.—Agents.

No. 566. J. Jeffrey, Suspender.—*Jeffrey—H. J. Robertson.* Bathgate Trustees, Chargers.—*Forsyth—Cockburn.*

Dec. 16, 1828.

First Division. Lord Alloway. H.

Trust—Accounting.—The bill of suspension noticed, ante, Vol. I. No. 375., having been passed, the question which came to be discussed was, whether the suspender, as one of the members of a Relief congregation, was bound to pay a certain sum as his share of the expenses which had been allocated upon him in terms of a deed of agreement and of trust entered into by all the mem-

bers. He contended that he was entitled to go into an accounting, to show that a less sum would be due: But the Lord Ordinary, holding that it would be impossible to carry on the trust were each member to bring a suspension at this stage; that several of them were insolvent; and that the sum allocated appeared to be the share due by the suspender, repelled the reasons; reserving to either party, when the trust is wound up, to claim from the other whatever shall be found to be the final balance. The Court adhered.

W. A. Martin, W. S.—C. Stuart,—Agents.

J. Lumsden, Suspender.—*Cockburn—Neaves.*
J. Allan and A. Mackie, Chargers.—*Keay—Handyside.*

No. 567.

Dec. 16. 1823.

First Division. Bill-Chamber. Lord Balgray. H.

Registry Acts—Principal and Agent.—In November 1815, John Adie was registered as part owner, to the extent of one-sixteenth, of the ship Euphemia of Aberdeen, and the usual oath was emitted, declaring that he and certain other persons were the sole owners. He was a member and the treasurer of the Aberdeen Commercial Company; and in December of the same year, he entered in their minutes this declaration: 'I John 'Adie, wright in Aberdeen, being the present 'treasurer of the Aberdeen Commercial Com-'pany, hold one-sixteenth share of the brigantine 'Euphemia, being the property of the Aberdeen 'Commercial Company, which share I do not

'consider myself having any right or title to far-
'ther than what my share as an individual of said
'Company may entitle me to, along with the
'other individuals of said Company.' Lumsden was part owner, and ship's husband of the vessel, and in the month of March 1816 he became a partner of the Company. It appeared that the price had been paid out of the funds of the Company to Lumsden as ship's husband; that he was perfectly aware that they had the substantial interest; that for several years he acted as their agent; that he settled for the freight with Adie, who, as treasurer, entered them in the Company's books; and that he received payment of his share as a member, of the profits thence arising. The entries, however, in the ship's books, were in name of Adie alone. In 1820 Adie became bankrupt, at which time Lumsden was his creditor by bill for £. 78 : 10 : 4, and had received £. 100 as the amount of freight due for the share of the vessel held by Adie. On the occurrence of this event, the trustee for the creditors of Adie claimed the share as his property, and the Company compromised the matter for a sum of money. They then, in name of the chargers, brought an action before the Court of Admiralty against Lumsden, for payment of the £.100 of freights. In defence he pleaded, that they had no title to pursue, because Adie was the registered owner, and, as in a question with him, he was entitled to compensation for the bill of £. 78 : 10 : 4. The Judge-Admiral repelled the defences, in respect 'that, although
'the name of John Adie stood in the register of

'the vessel as a part owner, yet it is not disputed by the defender, that Adie really held his share for behoof of the Aberdeen Commercial Company; that the defender, as ship's husband, as well as part owner of the vessel, acquired certain shares of the Aberdeen Commercial Company, and attended meetings of the partners of that Company, after Adie's name stood in the register of the vessel as aforesaid;' that it was therefore to be presumed that he was acquainted with the interest that the Company had in the vessel; and that this being a count and reckoning among joint owners, the registry acts were not applicable. Against this judgment Lumsden presented a bill of suspension, which the Court, on the report of the Lord Ordinary, refused; and, on a reclaiming petition, (after being equally divided), they by a majority adhered.

The majority of the Judges rested on the case of Dixon, and the opinion there delivered by Lord Chief-Justice Abbot, and held that Lumsden was to be regarded as the agent of the Company; that having in that character received the freights, he was barred personali exceptione from pleading the defence maintained by him. The other Judges, however, considered that it was impossible, consistently with the registry acts, to recognise any other person than Adie as the owner, or as enjoying the substantial interest in the vessel, the object of the statutes being to prevent latent trusts; and that, at all events, as the Company must be held to be the assignees of the creditors of Adie, they were liable to the plea of com-

pensation, which would have been available against these creditors.

Suspender's Authorities.—Spence, Jan. 20, 1809, (F. C.); 1. Holt, 296 et seq.; 1. Bell, 81; 1. Holt, 323, 324.
Chargers' Authorities.—1. Holt, 299; 1. Bell, 450; Dixon, 2. Bam. and Ald. 310.

CARNEGIE & SHEPHERD, W. S.—W. DUTHIE, W. S.—Agents.

No. 568. D. PRINGLE and Others.—*Solicitor-General Hope —More.*
MARQUIS OF TWEEDDALE and Others.—*Cockburn —Walker.*
Competing.

Dec. 16. 1823.
SECOND DIVISION
Lord Pitmilly.
F.

Society—Legacy.—The late General Fletcher Campbell, by his trust-settlement, appointed his trustee to pay '£.500 to the Farmer's Club, 'East Salton, to be vested in stock till a purchase 'of land offers, and the annual rent only applied 'to the purposes of the Club;' and he left a memorandum, declaring, that the interest only of the money left 'to the Farmer's Society of East Salton, which I have been the means of forming, 'be employed in premiums for the encouragement of agriculture, or any beneficial purpose 'connected with it;' and he appointed certain persons 'trustees for the Farmer's Club at East 'Salton.' After General Campbell's death, a proposal was made to the Salton Club to join a similar association established at Haddington, which was agreed to by the majority of the Salton Club. This united club was named the East

Lothian Agricultural Society, and out of five yearly meetings, two were appointed to be held at Salton. General Campbell's Trustees agreed to pay the legacy to the united society; but Pringle and others, who refused to concur in the union, and alleged that they still continued the Salton Club, claimed the legacy, and a multiplepoinding was raised to ascertain who had right to it. They contended, 1. That the Salton Club was of the nature of a partnership, the funds of which could not be communicated to any other society without the consent of all the members; and, 2. That it would be a perversion of the purposes of the bequest, to appropriate it to the use of the united club, which was a general society, for the purpose of encouraging agriculture over the whole county of Haddington, whereas the Salton Club was for promoting agriculture within a certain confined district. The Lord Ordinary and the Court (by a majority) preferred the East Lothian Society to the fund in medio.

The majority of the Court considered the junction of the Salton with the Haddington Club as merely an extension of the former; and that there was no such misapplication of the bequest as to warrant their interference, particularly as it appeared that the Salton Club had not strictly confined their exertions to a local district.

W. Cook, W. S.—J. Gibson, W. S.—Agents.

No. 569. F. M'LAUCHLAN, Pursuer.—*Solicitor-General Hope—Murray.*
J. MONACH, Defender.—*Forsyth.*

Dec. 16. 1823.
SECOND DIVISION
Lord Cringletie.
M'K.

Personal Injury—Delict.—M'Lauchlan raised an action of damages against Monach and M'Lellan, charging them, that while he was walking on the public road, they came riding furiously after him; that on looking behind, he saw Monach's horse coming directly on him, and, starting aside to avoid him, he was thrown down by M'Lellan's horse, and severely injured. M'Lellan defended himself, on the ground of an alleged submission; and Monach objected to the relevancy of the summons, in so far as related to him, as not charging him with having personally committed the injury, or conspired with M'Lellan to do so. The Lord Ordinary granted a diligence to M'Lellan for production of writs to support his defence, and assoilzied Monach, 'in respect it is not alleged in the summons, that Monach and M'Lellan had any connexion with each other, or had any malicious design against the representer, to injure or even disturb him, but that it is only stated that two men (who are afterwards specified to be the defenders) came riding furiously after the pursuer and his companion at full gallop, and it is not alleged that the defender Monach touched the pursuer in any way.' The Court recalled this interlocutor; found the summons relevant to infer damages; remitted to the

Lord Ordinary to proceed accordingly; and found Monach liable in expenses.

The Court were of opinion, that if the facts charged were established, Monach and M'Lellan must both have been versantes in illicito, and as such would be equally liable for the consequences of their misconduct, although guilty of no malicious intention to injure.

Pursuer's Authorities.—Innes, Feb. 6, 1798, (13189); Black, Feb. 9, 1804, (13905); Smith, March 8, 1810, (F.C.); Lord Keith, June 10, 1812, (F. C.); Brown, M'Gregor, and M'Kay, Feb. 26, 1813, (not rep.)

Defender's Authority.—3. Ersk. 1. 13–15.

TOD & WRIGHT, W. S.—J. STUART,—Agents.

G. LYON & COMPANY, and Mandataries, Pursuers. —*Alison.*

SIBBALD'S TRUSTEES, Defenders.—*Moncreiff—J. Wilson junior.*

No. 570.

Dec. 16, 1823.

SECOND DIVISION
Lord Cringletie.
M'K.

Payment — Acquiescence — Trustee.—The late William Sibbald, merchant in Leith, left a considerable debt due to G. Lyon & Co. of London, whom he had been in use to employ as his brokers. Within two months after his death, remittances were made by his Trustees, which reduced the debt to £.206, at which period Lyon & Co. opened an account in their books with the Trustees, and placed this balance to their debit. In managing and winding up the affairs of the deceased, the Trustees continued to employ Lyon & Co. to effect insurances, &c., and they made several remittances to them, with directions to

place them to the credit of the Trustees, 'in part 'liquidation of their account.' Annual accounts were rendered G. Lyon & Co. for three years, in which this £. 206 was placed to the debit of the Trustees, against whom there ultimately arose a balance of £.450, for payment of which, Lyon & Co. brought this action. The Trustees contended, that as to the balance of the account with the deceased, they were only liable qua Trustees, and not personally. It was argued for Lyon & Co., 1. That they were entitled to impute the remittances made by the Trustees to the liquidation of this, as the oldest item of the account, and that, therefore, the whole balance sued for, consisted of the proper debts of the Trustees; and, 2. That the Trustees not having objected, for several years, to this item being charged against them in the accounts rendered, were now barred by acquiescence. It was answered, 1. That the Trustees had specifically appropriated the remittances to the liquidation of their own account; and, 2. That they had no reason to object to the item in question being charged against them, as it was done expressly as Trustees of the deceased, in which character they admitted they were liable for it.—The Lord Ordinary decerned against them for the £.206, qua Trustees only, and the Court adhered.

Pursuer's Authorities.—(1.)—5. Ersk. 4, 2; Chitty, 289, 290; Clayton v. Dray, (Moreville, 585); Reid, January 29, 1782, (6818);—(2.)—Watt v. Selkrig; Willis v. Jernegan; (Aitken, 2751.)

Defender's Authority.—Lady Semple, July 13, 1703, (6803).

TENNANT & LYON, W. S.—H. SIBBALD, W. S.—Agents.

J. Telford.—*J. Hamilton.*
J. Stewart and Æ. M'Bean.—*Cuninghame.*
Competing.

No. 571.

This was a competition in a multiplepoinding, in which no general point occurred. The Lord Ordinary preferred Stewart and M'Bean, and the Court refused a petition.

Dec. 18, 1823.
First Division.
Lord Meadowbank.
H.

J. Campbell, W. S.—Carnegie & Shepherd, W. S.—Agents.

J. Munro, Pursuer.—*Cockburn—Matheson.*
M. Mackenzie, Defender.—*Jeffrey—Ivory.*

No. 572.

Proof.—In 1812, Mackenzie let a farm to Munro for twelve years, with a breach in his own favour on the expiry of each period of four years. In the event, however, of availing himself of this right, it was stipulated that the 'stock of sheep 'on the ground shall be then taken off Munro's 'hands, at such valuation as shall be put upon 'them by two persons to be mutually chosen by 'us, one by each, provided a twelvemonth's pre-'vious notice be given me of such your intention.' Mackenzie took advantage of the breach in 1816, received possession of the stock of sheep, but failed to get the valuation made. An action having been brought against him for their value, the Lord Ordinary, in 1820, before answer, remitted to a person of skill to ascertain and report what was the value of the sheep at the period of delivery.

Dec. 18, 1823.
First Division.
Lord Alloway.
S.

This having been done, his Lordship decerned in terms of the report. Against this Mackenzie reclaimed, maintaining that as the report could not be made from the personal knowledge of the reporter, but from inquiries at other parties, he was not bound by it, and was entitled to a remit to the Jury Court. But the Court adhered,—holding that it was part of the agreement that the value should be ascertained by valuators; that it was the fault of Mackenzie that a valuation had not been made in 1816; and that this was the only mode of extricating matters, and was, besides, the best evidence.

Æ. Macbean, W. S.—T. Mackenzie, W. S.—Agents.

No. 573. Mrs Graham and Others, Pursuers.—*Moncreiff—Skene.*
H. Veitch, Defender.—*Dean of Faculty Cranstoun—A. Bell.*

Dec. 18. 1823.
First Division.
Lord Alloway.
H.

Presumption—Proof. — On the 11th of May 1780, the late Lord Elliock granted to Mr Graham a bond for £.500, payable at Martinmas thereafter. The pursuers having acquired right to this bond, as heirs of Mr Graham, raised an action against the defender, the representative of Lord Elliock, which was executed on the 10th of November 1820, being one day short of the period of forty years from the term of payment. Against this claim the defender pleaded, that although he was not possessed of any written discharge, yet there was circumstantial evidence that it had been extinguished by payment. He

stated that the bond had remained in the hands of Mr John Anderson, W. S., who was agent for both the parties, till September 1780; that he then gave it to Mr Graham, and wrote to him in June 1781, mentioning that Lord Elliock had some intention of paying the bond at Martinmas; that Mr Graham died in 1782, and was succeeded by his son; that there were entries in Mr Anderson's books till 1785, debiting the one party, and crediting the other, with the interest; that there was no evidence of any interest having been subsequently paid; that in 1787, Mr Anderson, in answer to a letter from Mr Graham's son, stated that his smallest bond was one by Mr Hamilton of Bargany, for £.500; that the same gentleman, in 1788, drew up a list of the outstanding debts of Lord Elliock, in which no notice was taken of this bond; that in 1793, on the death of Lord Elliock, five different states of his debts were made up by Mr Anderson, but that there was no entry of the bond; that advertisements were published, calling on the creditors of Lord Elliock to come forward, but that this bond was not claimed on; that the defender, on his succession to Lord Elliock, brought an action of cognition and declarator, in which Mr Anderson appeared as agent for a sister of Mr Graham, who was a creditor by bond, but entered no claim on the bond in question; that in 1804, on the death of Mr Graham's son, the bond was discovered in a pocket-book belonging to Mr Graham, along with various documents, two of which were bonds in his favour, but which, it was admitted, had been previously paid; that

at this time, Mr Guthrie, a writer, had been employed by the representatives of Mr Graham, to make inquiries relative to the bond, and that, after communicating with Mr Anderson, the bond was laid aside, and had not been brought forward till sixteen years thereafter, when this action was brought. In addition to these circumstances, the defender proposed to instruct, by the evidence of Mr Guthrie, that Mr Anderson, and a sister of Mr Graham, (both of whom were now dead), had informed him, in 1804, that the bond had been paid, which induced him not to claim on it. From these circumstances, combined with the antiquity of the bond, the defender contended that there was evidence of its discharge. The Lord Ordinary, after granting a diligence, repelled the defences, in respect that, 'although from the length 'of time which has elapsed from the date of the 'bond, there may be strong reason to presume 'that the same had been settled in some shape 'or other, yet as the bond itself is produced un- 'discharged, and the action has been brought 'within forty years of the time of payment of 'the bond, and no evidence is produced of its 'having been paid, either in the books of the 'debtor or creditor, nor in the books of the a- 'gents for the parties, through whose hands pay- 'ment would most probably have passed.' The Court adhered, and refused to allow the examination of Mr Guthrie.

Their Lordships were agreed, that although this was a case of extreme hardship, that there was evidence

that the agents considered the bond to have been paid,—and that a discharge of so old a bond might be established rebus et factis, yet the presumptive evidence was not conclusive; that in order to be so, it ought to be utterly irreconcileable with the idea that the bond was still due, (which it was not), and that being ex facie an unexceptionable written document, effect must be given to it.

Defender's Authorities.—4. Stair, 45, 23; 4. Bank. 34, 2; Kingston, February 22, 1665, (12769); Gray, February 27, 1666, (12311); Balmerino, December 10, 1680, (16176); Mercer, December 15, 1681, (3150); Liddel, November 30, 1682; (1. Fount. 198); Cunninghame, March 18, 1686, (12326); Russell, June 13, 1788, (11390).

W. Stirling, W. S.—Mackenzie & Sharpe, W. S.—Agents.

W. Davidson, Advocator.—*Dean of Faculty Cranstoun—Henderson.*
J. Mercer, Respondent.—*More.*

No. 574.

Dec. 18, 1823.

Second Division
Bill-Chamber.
Lord Glenlee.
F.

Edinburgh—Property—Clause.—Davidson was proprietor of a house in Duke Street, at the corner of the Meuse Lane. By the titles of the property it was declared, 'that the buildings of the 'two streets, running north, shall not exceed fifty 'feet in depth over walls.' Davidson's house was about that depth. On his back area he proposed to erect low and flat-roofed buildings for shops, to be entered from the Meuse Lane; and he applied for leave to the Dean of Guild to do so. This was opposed by Mercer, the proprietor of the adjoining house in Duke Street, who founded on the clause in Davidson's titles. Davidson contended, that the clause only prevented him from

making the house in Duke Street of greater depth than fifty feet, but did not prohibit him from erecting additional buildings in the Meuse Lane. The Dean of Guild having refused the application, Davidson presented a bill of advocation, which was refused by the Lord Ordinary, and the Court adhered.

R. HENDERSON,—R. MERCER, W. S.—Agents.

No. 575. A. COOPER, Advocator.—*Jeffrey—Cuthrie.*
D. BONE and R. BLACK, Respondents.—*Jameson.*

Dec. 18, 1823.
SECOND DIVISION
Lord Cringletie.
F.

Landlord's Hypothec—Process—Advocation.—Young, a tenant of Cooper, who had not paid his rent, sold his cattle, by public roup, two days before the term. At this sale Bone purchased a quey for £.5, 11s., and Black another for £.5, 17s.; but before taking them away, or paying the price, they were warned, on the part of the landlord, that Young's rent was not paid, and that the landlord would bring back the cattle; and he accordingly did so, in virtue of a warrant from the Sheriff. Bone and Black then applied to the Sheriff, praying him to ordain Cooper 'to return 'the two queys, or to repay the price at which 'they were purchased, amounting to L.11, 8s.' The Sheriff having ordained the cattle to be restored, Cooper advocated, and the Lord Ordinary assoilzied him. In their first representation, Bone and Black contended, that the action before the Sheriff, being for an account under £.12, an advo-

cation was incompetent. The Lord Ordinary, on the ground that the application to the Sheriff was not for a sum of money, but to restore two queys, the real value of which might exceed £.12, and that the objection was not stated in limine, adhered; and the Court refused a reclaiming petition, without answers.

J. GEMMELL,—A. GOLDIE, W. S.—Agents.

N. W. ROBERTSON, Pursuer.—*Moncreiff—Sandford.* No. 576.
C. WINCHESTER, Defender.—*Lumsden.*

Dec. 19, 1823.

FIRST DIVISION. Lord Meadowbank. S.

Agent and Client.—The pursuer, a solicitor in Edinburgh, raised action against the defender, a law agent in the country, for payment of an account of professional business. The defender did not dispute the general rule, that the country agent is bound for the clients he recommends to the agent in the Supreme Court; but contended that there was an agreement or understanding between the parties, which liberated him from the effect of it. The Lord Ordinary and the Court, however, found that there was no conclusive evidence in support of the defence, and therefore repelled it.

N. W. ROBERTSON,—C. LUMSDEN, W. S.—Agents.

No. 577. SIR J. SINCLAIR and his Trustees, Pursuers.—*Moncreiff—Horne.*
W. SINCLAIR, Defender.—*Jeffrey—Monteath.*

Dec. 19, 1823.
SECOND DIVISION
Lord Cringletie.
B.

Presumed Payment—Bill of Exchange.—John Sinclair of Freswick, predecessor of the defender, was indebted to the pursuer's predecessor, George Sinclair of Ulbster, in the sum of £.600, constituted by a clause of warrandice, in a conveyance of lands, and a subsequent decreet-arbitral. In payment of this, John Sinclair granted a bill to George Sinclair's agent, which, after being protested, was by him assigned to George Sinclair. Several years after the lapse of the sexennial prescription, Sir J. Sinclair, as representing George, raised action against William Sinclair, as representing his predecessor, for payment of this debt, but not founding on the bill. The defender admitted, that there had been no novation; but pleaded, in defence, that the pursuer, having accepted a bill in payment of his debt, and allowed the period of the sexennial prescription to elapse, the debt contained in the bill must be presumed to have been paid. To this it was answered, that the debt being originally constituted by writing, the prescription merely extinguished the bill; but left the pursuer at liberty to raise action on the original obligation. The Court, on the report of the Lord Ordinary, repelled the defence.

Pursuer's Authorities.—Cases in Dict. Vol. i. p. 477; and Vol. ii. p. 1525. Rutherford, Feb. 25, 1785, (7069); Douglas, Heron & Co., July 24, 1785, (7070); Campbell, May 19, 1797, (1648).

Defender's Authorities.—Buchan, Jan. 31, 1787, (11128); Russel, May 23, 1792, (11130); Lindsay, May 19, 1797, (11137); Horsburgh, Feb. 13, 1811, (F. C.).

D. Horne, W. S.—G. Napier,—Agents.

W. Ferrier, Pursuer.—*Robertson.*
T. Aitken, Defender.—*Gillies.*

No. 578.

Dec. 20, 1823.

First Division. Lord Meadowbank. S.

Messenger.—On the 17th of February 1823, Ferrier sent to Russell in Falkirk a caption against 'John Ferrier, steward or farm-servant to 'Robert Warden, Esq. of Parkhill,' with instructions to incarcerate him in the nearest jail. Russell, not being a messenger, gave it to Aitken, who was so, and wrote to Ferrier's agent, informing him of this. On the 19th, Aitken was desired by Ferrier's agent to execute the caption, in terms of the instructions sent to Russell. Having made inquiries, Aitken wrote, on the 20th, that the debtor did not reside at the place pointed out, but near Linlithgow; and offered to send the caption to a messenger there. Ferrier's agent, on receiving this letter, notified, that he held Aitken liable for the debt. To this Aitken answered, that he did not understand that he was to search for the debtor throughout the country; but presuming from the last letter that such was his meaning, he had gone to Linlithgow and executed the caption. An action was then raised against him for payment of the debt, founding on gross neglect. His defence was, that a wrong designation of the debtor was given to him; that he was not instructed to search for him in any other

place; and that he had performed his duty as actively as, consistently with his instructions, it was possible. The Lord Ordinary assoilzied him, and the Court refused a petition.

The Court were satisfied that the delay was occasioned entirely by the nature of the instructions given to the messenger.

A. ROBERTSON, W. S.—W. SMITH,—Agents.

No. 579. MAGISTRATES OF GLASGOW, Petitioners.—*Jardine.*
J. AITCHISON, Respondent.—*Mone.*

Dec. 20, 1823.

SECOND DIVISION B.

Execution pending Appeal.—The Court granted execution pending appeal of the cases, ante, Vol. I. No. 554, and Vol. II. No. 857, to be staid in the event of the respondent finding unexceptionable caution, by the first Saturday of January, for all that might ultimately be due by him.

W. DICKSON, W. S.—R. HENDERSON,—Agents.

No. 580. T. LAWRENCE and Others, Advocators.—*Maconochie.*
MRS IMRIE and HUSBAND, Respondents.—*Buchanan.*

Jan. 13, 1824.

SECOND DIVISION Lord Pitmilly. B.

This was a question of fact, viz. Whether certain alleged arrears of stipend were still due. The Sheriff found them due, and decerned for them;

but the Lord Ordinary and the Court, being satisfied that they had been paid, assoilzied.

J. Thomson, W. S.—J. Pedie, W. S.—Agents.

Lord Forbes and Others, Pursuers.—*Dean of Faculty Cranstoun—Skene—Anderson.*
Leys, Mason, & Company, Defenders.—*Moncreiff—Lumsden.*

No. 581.

Jan. 13, 1824.

Second Division
Lord Cringletie.
M'K.

Salmon-fishing—Title to pursue.—Lord Forbes and others, heritors on the upper part of the river Don, raised an action against Leys, Mason and Company, concluding, inter alia, for the removal of a dam-dike, erected by them in 1805, across the Don, as being injurious to their salmon-fishings. Leys, Mason and Company objected, that the pursuers had no right of salmon-fishing, and even if they had such a right, they had no interest to remove the dam-dike; because, as there were many others on the lower part of the river, its removal would be productive of no benefit. In support of their title, the pursuers produced grants of salmon-fishings from subjects-superior, and grants from the Crown, 'cum piscationibus,' merely; and in proof of a prescriptive possession, they founded on an interlocutor of a Lord Ordinary in 1745, sustaining their title to insist in an action against the cruive-fishers, for regulating the cruives in the Don;—on a decreet-arbitral afterwards pronounced in that action, by which their titles were also sustained, and to which an author of the defenders was a party;—on a similar decreet.

arbitral in 1787; and on an agreement in 1793, by which the cruive fishers agreed to pay to the upper heritors (including the pursuers) a sum annually for nineteen years, for liberty to fish, and which rent had been regularly drawn by the upper heritors. Besides these titles, Lord Forbes produced a crown charter, 'cum piscationibus 'salmonum,' granted in 1816, which, he contended, gave him a title to object to encroachments made prior to its date; and that although a delay to complain of them might afford a defence of acquiescence on the merits, yet it could create no objection to the title. The Lord Ordinary and the Court sustained the title of the pursuers, and found that they had a sufficient interest to pursue.

The Court were of opinion, that the documents referred to afforded sufficient proof of prescriptive possession, and that a crown grant of salmon-fishings gave a sufficient title to challenge operations prior to its date;—a plea of acquiescence being a defence on the merits, which could not be discussed in a question of title.

T. CRANSTOUN, W. S.—DALLAS & INNES, W. S.—Agents.

No. 582.

T. SIME, Pursuer.—*Jeffrey—Simpson.*
J. DUNCAN & COMPANY, Defenders.—*Cockburn—Walker.*

Jan. 13, 1824.

SECOND DIVISION
Lord Cringletie.
F.

Guarantee.—Duncan indorsed to Rordanz and Irwin a bill drawn upon and accepted by Leach, who failed to retire it. Recourse was then had

against Duncan, who also being unable at that time to pay it, an arrangement was entered into, by which it was agreed, that while an attempt should be made to recover the amount from Leach, the money should be raised by bills accepted by Rordanz and Irwin, for the accommodation of J. Duncan and Company, (of which Duncan and his father were the partners); and in consideration of doing so, that company granted the following guarantee: 'As you seem to apprehend 'that you may sustain some loss from your friend-'ly interposition in the business with Leach, we 'therefore guarantee you against this.' Rordanz and Irwin having failed to recover the amount of the bill from Leach, and the accommodation having led to a series of bill transactions, they assigned their claim to Sime, who raised action against J. Duncan and Company for payment of the original bill, and also of the balance arising out of the transactions relative to it. Duncan and Company contended, that their guarantee extended only to the amount of the bill itself, and not to any balance arising out of the accommodation transactions. The Lord Ordinary found, that the guarantee extended to any loss arising 'out of 'the drawing bills, originating from Leach's bill 'remaining unpaid;' and the Court adhered, decerning in favour of Sime for the balance reported by an accountant to be due.

T. WALKER,—J. YOUNG,—Agents.

No. 583.

MRS GRAHAM, Pursuer.—*Campbell.*
DR FREER, Defender.—*Solicitor-General Hope—Marshall.*

Jan. 14. 1824.

FIRST DIVISION. Lord Alloway. H.

Factor—Landtax—Interest.—This was a question of accounting, between the pursuer as the executor, and the defender as the heir of his brother, the late Dr Freer, who resided and died in India. The defender had been employed by him to act as factor on a small landed estate in this country, and to invest any money which he might remit home, in heritable security. Three objections were stated to his accounts: 1st, That he took credit for a sum with which he had purchased the land-tax of the estate to which he had succeeded; 2d, That in the circumstances he was not entitled to a factor-fee; and, 3d, That he did not debit himself with interest upon the interest of sums which yet remained in his hands. To these it was answered, 1st, That the purchase of the land-tax was authorised by the order to vest the money in heritable security, and that it had been notified, and not objected to by the deceased; 2d, That there was no reason why a factor-fee should not be awarded; and, 3d, That although he was willing to pay compound interest during the currency of the factory, yet interest upon that accumulated sum was illegal. The Lord Ordinary sustained the objection to the price paid for the land-tax, as it was not directly authorised, and it was proved that the deceased was not aware of the effect it would have upon his succession; found, that in the

peculiar circumstances, no factor-fee was due, more especially as it had never been charged in the accounts rendered to the deceased; and that the defender was liable, in terms of the report of an accountant, in interest, at the rate of 4 per cent. upon the accumulated balance. The Court altered as to the land-tax, in respect the purchase was embraced in the instructions given by the deceased, and that although it was communicated to him, he had never objected to it; but adhered quoad ultra.

Pursuer's Authority.—(5.)—D. of Queensberry's Executors, May 23, 1829; (*ante*, Vol. T. No. 486).

Defender's Authorities.—(2.)—1. Hume, 498; 3. Ersk. 3, 81; 1. Bell, 568.

A. DUNCAN.—D. & A. THOMSON, W. S.—Agents.

MRS DARLING, Pursuer.—*More.*
T. WATSON and J. ADAMSON, Defenders.—*Dean of Faculty Cranstoun—Greenshields.*

No. 584.

Jan. 14, 1823.

SECOND DIVISION
Lord Pitmilly.

Trustee.—The late James Stormonth, by his deed of settlement, appointed 'James Darling, 'writer in Kelso, Margaret Stormonth, his wife,' and certain other persons, 'and the surviving ac-'ceptors of them,' his trustees. At his death in 1817, Mrs Darling, being under the impression, that, as she was a married woman, she was not entitled to act as a trustee, did not declare her acceptance, and allowed the other trustees to manage the property of the deceased till 1821, when she raised this action, to have it declared, that

she was entitled to act and vote as a trustee. Watson and Adamson, two of the accepting trustees, opposed this, and contended, 1. That admitting that a married woman could validly act as a trustee, yet the nomination in the present case being of Mrs Darling and her husband, it could only confer a single vote on the two, which was already exercised by the husband; and, 2. That by not accepting for four years, Mrs Darling must be held to have renounced her right. The Lord Ordinary repelled the defences, and the Court adhered, 'in respect it has been judi-'cially admitted, that the pursuer is ready to 'confirm all the former actings of the trustees.'

The Court held, that the general question, whether a married woman was qualified to act as a trustee, was completely settled by the case of Stoddart; and that the terms of the nomination in this case conferred a separate vote on each of the parties.

Pursuer's Authorities.—(1.)—Stoddart, June 30, 1812, (F. C.); 2. Bell, March 10, 1784, (16374); Campbell, July 6, 1627, (16705.)
Defenders' Authorities.—(1.)—1. Stair, 4, 9; 1. Ersk. 6, 14.

J. S. DARLING, W. S.—BROWN & LAWSON, W. S.—Agents.

No. 585. J. DRUMMOND & COMPANY, Advocators.—*Pyper.*
W. CROOM, Respondent.—*L'Amy.*

Jan. 14, 1823.

SECOND DIVISION
Lords Pitmilly and M'Kenzie.

F.

Guarantee—Interest.—Thomas Robertson, a sequestrated bankrupt, offered to his creditors a composition, payable by three instalments, and proposed William Robertson as cautioner for

payment of it, and Croom as cautioner for his sufficiency, to the extent of one half of the composition, stipulating that the creditors 'should convey over to the cautioner for the said composition, all right competent to them for reducing any preferences granted by the bankrupt to his creditors.' A bond was accordingly drawn up, whereby Croom bound himself 'subsidiarie to the said William Robertson, and reserving 'the benefit of discussion,' to warrant the payment of the composition to the extent of one half; but no stipulation was introduced into the bond as to the assignation of the right of reducing preferences. Before signing the bond, Croom obtained from J. Drummond and Company this letter of relief: 'You will please sign the bond, 'binding yourself as guarantee of William Ro- 'bertson for the one half of Thomas Robertson's 'composition to the creditors on his sequestrated 'estate, with interest and penalty; and we bind 'and oblige us to free and relieve you thereof, 'and of all loss and damage you may sustain 'thereby, and that to the extent of L. 300 Ster- 'ling.' The bankrupt having been again sequestrated, before the last instalment fell due, and the principal cautioner having fled the country before the term of payment of the second instalment, Croom was obliged to pay nearly one half of the composition, in terms of his obligation. He thereon raised an action of relief before the Magistrates of Glasgow against Drummond and Company, and obtained decree. In an advocation, Drummond and Company pleaded, 1. That

Croom had forfeited the benefit of their guarantee, by not having insisted on an assignation of the right to reduce preferences, and by neglecting to exercise the privilege stipulated in the bond, of discussing the principal cautioner and the bankrupt; and, 2. That, at all events, their obligation being limited to a definite sum, Croom could not claim interest, or any thing beyond the exact amount of £. 300. The Lord Ordinary decerned against Drummond and Company, with interest from the date of citation to the action before the Magistrates; and the Court refused a reclaiming petition, without answers.

The Court were of opinion, that Croom could not be chargeable with neglect in not discussing the principal cautioner and the bankrupt, as the one had been sequestrated, and the other had fled the country; and that as the assignation of the right to reduce preferences was not stipulated for in the bond, Croom was not entitled to enforce it.

Advocates' Authorities.—(1.)—University of Glasgow, Nov. 13, 1810, (2104); Houston, March 4, 1820, (F. C.); Jeffrey, Feb. 27, 1819, (ante, Vol. I. No. 404.); 3. Ersk. 3, 66.;—(2.)—3. Ersk. 3, 76-7, Muirhead, June 22, 1750, (582); Duke of Gordon's Curators, Jan. 2, 1760, (517.)

G. NAPIER,—A. STEELE,—Agents.

G. HAMILTON, Pursuer.—*Cuninghame.*
REID'S TRUSTEES, Defenders.—*Ro. Bruce.*

No. 586.

Jan. 15, 1824.

FIRST DIVISION.
Lord Alloway.
D.

Landlord and Tenant.—Hamilton having let a farm situated in East Lothian to Reid, brought an action after his death, and after the termination of the lease, against his trustees, for payment inter alia of £300, as the price of a turnip crop raised during the last year, and which they had sold. The Lord Ordinary remitted to persons of skill, 'to report what is the custom of the county of East Lothian, with regard to the outgoing 'tenant having a crop of turnips, whether he 'is bound to consume the same upon the lands, 'or whether he is entitled to sell the same.' They reported that the defenders 'had right to sell the 'turnips of their last crop, and to permit them 'to be carried away; one or two instances having occurred in this county very lately, and on 'one of them a very high law opinion having 'been obtained in favour of removal; and we 'think it would be easy to make it clear, that 'neither the interest of the landlord or incoming 'tenant could be injured by the practice.' The Lord Ordinary, in consequence of this report, and in respect they were entitled to dispose of the turnips, assoilzied the defenders from this claim; and the Court refused a petition, without answers.

J. HAMILTON, W. S.—D. TURNBULL, W. S.—Agents.

No. 587. Mrs E. Ewen or Grahame, Pursuer.—*Solicitor-General Hope—Greenshields.* Ewen's Trustees, Defenders.—*Dean of Faculty Cranstoun—Jeffrey—Buchanan—Pyper.*

Jan. 15, 1824.

First Division. Lord Kinedder. D.

Discharge—Heir of Provision—Process.—The late John Ewen, at a period when he was in very indigent circumstances, married Janet Middleton, by whom he acquired certain heritable subjects of no great value, and a small sum of money. Soon thereafter, they entered into a contract of marriage, by which, after conveying to him her property, he assigned to her, in case she should survive him, and there should be no children of the marriage, the whole estate of which he should be possessed at his death; but it was stipulated, 'that, in case the said John Ewen shall survive 'the said Janet Middleton, his spouse, and there 'be a child or children of the marriage in life at 'the dissolution thereof, he binds and obliges 'himself to aliment, maintain and educate the 'said child or children suitable to their situation, 'until they are put in a way of doing for themselves, and that his subjects, whether heritable 'or moveable, shall belong to them equally at his 'death.' His wife predeceased him, leaving an only child, the pursuer; and thereafter, by success in trade, Ewen acquired a considerable fortune. The pursuer, without his consent, married Grahame, which greatly displeased him. At that time neither of them exceeded twenty-one years of age, and were entirely dependent on Ewen.

He procured a situation for Grahame in India; and immediately before his departure, he caused a post-nuptial contract to be executed, in which, after narrating that 'the said John Ewen, out of his 'own free will, and from the regard he bears to 'his son and daughter,' had paid to Grahame £.315, 'which he has agreed to give in name 'of tocher or dowry with his said daughter,' therefore the pursuer and her husband did thereby 'accept of the same in full contentation to 'them of all goods, gear, debts, sums of money, 'and moveables whatsoever, which they might 'any ways ask, claim or crave by and through 'the decease of the said Janet Middleton her 'mother, by virtue of the contract of marriage 'with the said John Ewen her father, or of any 'clause, article, or condition therein contained, 'which is hereby discharged to all intents and 'purposes, as fully and effectually as if the same 'was particularly engrossed, or by any other manner of way, or by and through the decease of 'the said John Ewen her father, whenever the 'same shall happen at the pleasure of God, either as bairn's part of gear, dead's third, portion natural, or any other cause or account 'whatever.' It did not appear that the pursuer was made aware of the nature of the provision in the marriage-contract of her parents. At the distance of some years, Ewen died, leaving property to the amount of £.16,000, the greater part of which was moveable. On deathbed he made a settlement, by which he left an annuity of only £.40 to the pursuer, and bequeathed the great

bulk of his fortune to Trustees, to found a charitable institution. Of this trust-deed, and of the discharge contained in the postnuptial contract of marriage, the pursuer brought an action of reduction. In defence, Ewen's Trustees maintained that the discharge was unobjectionable, and was sufficient to deprive her of any interest in her father's estate. To this she answered, 1. That the discharge had been obtained from her by fraud and circumvention,—that she was not aware of the contract between her father and mother containing the provision in her favour,—and that her father had held forth that the sum which he paid to her was gratuitous on his part. 2. That the terms of the discharge did not import a renunciation of her rights as heir of provision,—that although she had discharged all right arising out of the contract of marriage through the decease of *her mother*, yet she had not discharged those rights which were provided to her in the event of her father's survivance, and which were to vest in her on *his* death: And, 3. That if her right as heir of provision still existed, then the trust-deed was in fraudem of the contract, and at all events was reducible on the head of deathbed. The Court on the report of the Lord Ordinary, decerned in terms of the libel; and thereafter, on a petition and answers, adhered, 'in so far as relates 'to the reduction of the trust-deed executed by 'the said John Ewen, as having been granted in 'fraudem of his marriage-contract with Janet 'Middleton; but alter the interlocutor re-'claimed against, in so far as it may be construed

'to extend to the reduction of the marriage-contract entered into between the respondent and James Grahame her husband, and find it unnecessary to reduce the said contract, in respect that the same does not import any discharge of the rights competent to the pursuer on the death of her father, as heir of provision under her father and mother's contract of marriage.' The Trustees, alleging that this was a new interlocutor, presented another petition, but the Court refused it as incompetent.

Pursuer's Authorities.—St. 156; 3. Ersk. 4, 9; Swan, June 17, 1620, (5038); Wemyss, July 24, 1706, (912); Gordon, Dec. 21, 1702, (5050); Monro, Dec. 16, 1718, (5052); Anderson, Nov. 22, 1748 (6054); Hepburn, June 24, 1785, (5056); Fife, Nov. 29, 1751, (11750); Nisbet, Jan. 18, 1726, (8181); Sinclair, July 29, 1769, (8188); Irvine, Dec. 15, 1744, (2304); Maxwell, Feb. 1722, (3194.).

Defender's Authorities.—Mackinnon, Feb. 24, 1763, (8274); Crawford, Dec. 24, 1746, (8274); Riddel, Nov. 28, 1781, (6457); 1. Ersk. 6, 55.

BROWN & LAWSON, W. S.—J. MORRISON, W. S.—Agents.

H. MACGREGOR and Others, Suspenders.—*Cockburn—Sandford.*
J. PROUDFOOT, Charger.—*Solicitor-General Hope—Lockhart.*

No. 588.

Jan. 15, 1824.

FIRST DIVISION. Lord Alloway. S.

Excise Statutes—Jurisdiction.—Proudfoot, a supervisor of excise, obtained decree for statutory penalties against Macgregor and others, masters and stewards of various steam-boats plying on the Clyde, for selling on board of these vessels, ale,

spirits, and wine, without licence. In a suspension they maintained, 1. That they were not included within the provision of the statutes, and that, accordingly, the Justices of the Peace had, on this account, refused to grant them licences; and, 2. That the Justices of the Peace had no jurisdiction to judge of offences which were committed beyond the flood-mark. On report of the Lord Ordinary the Court, holding that the statutes did not apply to persons in the situation of the suspenders, suspended the letters simpliciter.

Charger's Authorities.—9. Geo. II. c. 23, § 1, 6; 16. Geo. II. c. 8; 17. Geo. II. c. 17, § 19; 30. Geo. III. c. 38, § 9; 33. Geo. III. c. 69. § 2 & 3; 47. Geo. III. c. 66, § 7.

J. STUART,—D. HORNE, W. S.—Agents.

No. 589. W. SCOTT, Pursuer.—*Maidment.*
A. EWART'S REPRESENTATIVES, Defenders.—*More.*

Jan. 15, 1824.

SECOND DIVISION
Lord Craigletie.
F.

Process.—In an interlocutor pronounced and signed by the Lord Ordinary (of date 12th June), in an action at the instance of Scott against the representatives of the late Andrew Ewart, his Lordship, by a clerical error, decerned for a larger sum than he intended. On a motion at the bar by the defender's counsel, his Lordship afterwards pronounced a new interlocutor, correcting the error, and decerning for a smaller sum. Scott petitioned against this last interlocutor, and contended, that it was incompetent for the Lord Ordinary to alter an interlocutor even for the purpose of cor-

recting a clerical error, except on a representation. The Court recalled 'the interlocutor com-'plained of, as informal, being pronounced with-'out a representation;' and 'of consent found 'it competent for his Lordship still to receive a 'representation against the interlocutor of the '12th of June.'

Pursuer's Authority.—1. Ivory, 199.

R. Pitcairns, W. S.—W. Ellis,—Agents.

Mrs Muirhead or Paterson, Pursuer.—*Greenshields—Moncreiff.*
J. Paterson and Others, Defenders.—*Jeffrey—Monteith.*

No. 590.

Jan. 16, 1824.

First Division.
Lord Mackenzie.
D.

Fiar or Liferenter.—The pursuer, who was fiar of a small heritable property, married Paterson, and entered into a postnuptial contract, by which they disponed to themselves, 'in conjunct fee 'and liferent, and to the children procreate or to 'be procreated of our marriage; whom failing, 'our next nearest heirs, in fee, heritably and 'irredeemably, all lands,' &c. of which they were then in possession, or should afterwards acquire: And, in particular, she disponed to 'the 'said Alexander Paterson, my husband, and to 'myself, in conjunct fee and liferent, and to our 'foresaid children; whom failing, to our next 'nearest heirs as aforesaid, in fee, heritably and 'irredeemably,' her heritable subjects. This deed was drawn by the brother-in-law of Paterson, con-

tained many inconsistent clauses, and showed that the framer of it was ignorant of the principles of conveyancing. On the death of the pursuer's husband, his heirs contended, that by this deed Paterson was fiar, and that she had only a right of liferent. She therefore brought an action to have it declared that she was the fiar. The Lord Ordinary found, that the deed must be construed as giving the fee to the husband; but the Court altered, and found that the fee belonged to the pursuer.

The Judges were of opinion, that as the property belonged originally to the pursuer,—as the dispositive clause did not import that her right was limited to a liferent,—and that although there were other clauses implying merely a liferent, yet as the deed was in many respects inconsistent and unintelligible, the fee was to be held as still belonging to her.

Pursuer's Authorities.—3. Ersk. 8, 36; Bank. 636.
Defenders' Authorities.—2. St. 6, 10; 3. Ersk. 9, 36.

CAMPBELL & MACK, W. S.—G. NAPIER,—Agents.

No. 591.

D. MOON, Suspender.—*Maitland.*
T. LAMB, Charger.—*Cuninghame.*

Jan. 16, 1824.

FIRST DIVISION. Bill-Chamber. Lord Eldin. S.

This was a question as to passing a bill of suspension of a decree of an inferior court without caution. The Lord Ordinary passed it on caution; but the Court remitted to receive juratory caution.

J. GEMMEL,—A. P. HENDERSON,—Agents.

M. PATERSON, Suspender.—*Corbet*—*Hutcheson*. No. 592.
M. FOREMAN and Others, Chargers.—*J. Miller jun.*

Jan. 16, 1824.

FIRST DIVISION.
Lord Alloway.

Statute 1621, *c.* 18.—Main granted a lease, for 999 years, 'to James Macbea and Margaret Foreman (spouses), and the longest liver of them, in liferent, for their liferent use and possession allenarly, &c.; and after their deaths, or in the event of the said James Macbea not possessing the subject himself, to and in favour of their children, Agnes, John, and George Macbeas equally, and to the children lawfully procreate of their bodies; whom failing, to the survivors, and their heirs whatsomever, in fee.' The subjects were described as consisting of fifty-two falls, 'with the houses built by the said James Macbea thereon.' At this time Macbea was an undischarged bankrupt; and he afterwards obtained a decree of cessio, under which he conveyed to Paterson his right to the lease. On his death, his widow brought an action of removing against Paterson and his tenant, in which she obtained decree. Of this Paterson brought a suspension, and also a reduction on the act 1621. The Lord Ordinary repelled the reasons, in respect that Macbea had only a liferent right, which was now vested in his widow, and assoilzied from the reduction, in respect that the debts upon which Paterson founded his title were all prescribed or paid, and that there was evidence that the houses had been erected by means of

funds belonging to Macbea's eldest son. The Court refused two petitions, without answers.

G. Mill,—D. Greig, W. S.—Agents.

No. 593.

J. Anderson, Suspender.—*Rutherford.*
E. Clouston, Trustee on Geddes's Estate, Charger.—*Skene—Maidment.*

Jan. 16, 1824.

Second Division
Lord Pitmilly.
F.

Bill of Exchange—Proof.—Clouston, trustee on Geddes's sequestrated estate, having obtained decree before the Sheriff of Orkney against Anderson, the bankrupt's father-in-law, for payment of his accepted bill to Geddes, found in the repositories of the latter, charged him thereon. Anderson brought a suspension, alleging that this bill had been accepted with the view of retiring a promissory-note by him in favour of Geddes, who had indorsed it to Sir William Forbes and Company; that he had accordingly sent it to his agent at Edinburgh, but that it did not arrive until after the note had been retired by Geddes; that Geddes, who had formerly given credit on his account for the note, then debited him with its amount; that the acceptance had accidentally come into the possession of Geddes, and was not held by him as a document of debt; and that at subsequent periods they had settled accounts, leaving a small balance in favour of Geddes. In proof of these allegations, Anderson produced a letter from his agent, to whom the acceptance had been transmitted, and the accounts doqueted by Geddes. Clouston contended, 1. That these

accounts not being probative writs, and having been produced after the bankruptcy, could not be held to prove their own dates, so as to be admitted as evidence, especially in a question with so near a relative of the bankrupt; and, 2. That, at any rate, action should lie on the bill for the balance due Geddes, as it must be presumed to have been deposited in security of that balance. The Lord Ordinary, holding it 'proved, by competent evidence, that Geddes did not pay value 'for the bill in question,' suspended the letters simpliciter, 'reserving to the charger to demand 'payment, in a competent action, of the balance 'appearing to be due to Geddes on the doqueted 'accounts;' and the Court adhered.

Charger's Authorities.—2. Mackenzie, 17; 2. Bell, 193.

J. G. Hopkirk, W. S.—J. M'Cook, W. S.—Agents.

EARL OF BREADALBANE, Pursuer.—*Jardine.* No. 594.
MACDONALD and Others, Defenders.—*A. Wood.*

Adjudication—Trust-Deed.—In 1812, Macnab of Macnab disponed his landed property to Macdonald and Lawson, W. S. in trust, for behoof of his creditors, reserving a yearly annuity to himself. Lord Breadalbane, who was a creditor to a considerable amount, for rents of a farm in which Macnab was tenant, accepted from the trustees an obligation to pay these rents out of the trust-estate. Some time thereafter he brought an adjudi-

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SECOND DIVISION
Lord Craigletie.
M'K.

cation of the trust-estate for the amount of these rents, in which he called the Trustees, and also Macnab himself. They opposed the warrant for intimation of the adjudication, on the ground that Lord Breadalbane had acceded to the trust-deed, by accepting the obligation of the Trustees, and was thereby precluded from interfering, by diligence, with their management of the trust-estate. The Lord Ordinary granted warrant for intimation, and the Court adhered.

The Court, while they held that Lord Breadalbane had acceded to the trust, by accepting the obligation by the Trustees, were of opinion, that he was entitled to enforce that obligation by diligence, the Trustees not having taken any steps to realize the trust funds.

Pursuer's Authorities.—Leith, Feb. 25, 1759, (1212); Colville, Jan. 22, 1779, (1221); Ederline's Cred. Jan. 14, 1801, (F. C.); 1. Bell, 6412.

H. Davidson, W. S.—C. Macdonald, W. S.—Agents.

No. 595. J. Napier, Suspender.—*Dean of Faculty Cranstoun—Greenshields.*
J. Carson, Charger.—*Forsyth—Boswell.*

Jan. 17, 1824.

Second Division Bill-Chamber. Lord Mackenzie.

Competent and Omitted—Stamp-acts—Expenses.—Carson charged Johnstone on two acceptances, who brought a suspension, in which Napier became his cautioner. Johnstone having been sequestrated, and his trustee declining to prosecute the suspension, it was carried on by Napier, who merely pleaded that Carson had become a

party to a composition contract with Johnstone. The Court ultimately found the letters orderly proceeded, and decerned for expenses. Napier having been charged on this decreet for payment of the bills and the expenses of process, presented a bill of suspension, on the ground that the bills had truly never been protested; that the instrument of protest produced was vitiated, and that the protest of both bills was contained in the same instrument, contrary to the provisions of the stamp-acts. Carson pleaded competent and omitted. It was answered, 1. That this is not pleadable against a suspender, who must be considered as a pursuer; 2. That the grounds of suspension were res noviter venientes ad notitiam; and, 3. That it being pars judicis to give effect to any objection on the stamp acts, the plea of competent and omitted could not be received against such an objection. The Lord Ordinary refused the bill; but the Court altered and passed it as to the amount of the bills, refusing it as to the expenses charged for.

Suspender's Authorities.—(1.)—Kinloche, Dec. 27, 1698, (12233); Stewart, 1819, (not rep.); 4. Stair, 2, 16; 4. Bankt. 36, 19;—(2.)—4. Stair, 1, 44; 4. Mackenzie, 3, 3; 4. Ersk. 3, 3;—(3.)—55. Geo. III. c. 184; Barbour, May 25, 1833, (ante, Vol. II. No. 309.)

Charger's Authorities.—(1.)—1681, c. 20; Act of Regulations, 1672, § 19; 4. Stair, 1, 50; 4. Bankt. 36, 19; 4. Ersk. 3, 3, 22;—(2.)—Cases in Dict. vol. ii. p. 208; Vilant, June 17, 1763, (12209); Dundas, March 9, 1810, (F. C.); Dumbarton, Nov. 18, 1813, (F. C.).

W. Renny, W. S.—H. Cannan, W. S.—Agents.

No. 596. C. GREENHILL, & GENERAL HUNTER, Petitioners.
—*Solicitor-General Hope — Greenshields — A. Maitland.*
A. CUMINE, Respondent.—*Skene—Buchanan.*

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Lord Alloway.
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Sequestration.—Ritchie, collector of taxes for the county of Forfar, having fallen into arrears to the Crown, to the extent of upwards of £.10,000, Mr Greenhill and General Hunter, his cautioners, paid up this sum, the former to the extent of £.3000, and the latter of upwards of £.7000, and they obtained an assignation from the Receiver-General to the arrears due by Ritchie. Having made Ritchie legally bankrupt by diligence, Greenhill and Hunter presented a petition to the Court, praying for sequestration of his estates, under the bankrupt statute. The petition having been remitted to the Lord Ordinary on the Bills during vacation, his Lordship awarded sequestration. Cumine, a creditor of Ritchie, reclaimed against the Lord Ordinary's interlocutor, and also presented a petition for recall of the sequestration, on the grounds, inter alia, 1. That the oath of verity was emitted by Greenhill alone, instead of having been by the two cautioners; and, 2. That more than a year had intervened between the date of the oath and the application for sequestration. To this it was answered, 1. That to the extent of the amount paid by each of the cautioners, the debt was due to each of them separately; and, 2. That the oath of verity had been emitted with a view to this application, which had only been delayed

in consequence of some difficulty in making Ritchie legally bankrupt, and that it was not alleged that the debt had suffered any diminution since the date of the oath. The Court adhered to the Lord Ordinary's interlocutor, and refused the petition for recall of the sequestration.

T. Deuchar,—P. Irvine, W. S.—Agents.

MANUEL and COMPANY, Suspenders.—*Forsyth—D. Dickson.* No. 597.

W. HOWISON, Charger.—*Gillies.*

Bill of Exchange.—Manuel and Company being charged by Howison on a bill of exchange, presented a bill of suspension, on a general allegation, that in an accounting between the parties it would turn out that the balance was in their favour. The Lord Ordinary and the Court refused the bill.

Jan. 17, 1824.

SECOND DIVISION Bill-Chamber, Lord Mackenzie.

J. Swan, W. S.—R. Cairns,—Agents.

J. JOHNSTONE, Advocator.—*Forsyth—Sandford.* No. 598.

W. DUNCAN, W. S., Respondent.—*Skene.*

Society.—Duncan, W. S. raised action before the Sheriff, against Scott and Johnstone, as partners of the concern of Thomas Scott and Company, for payment of an account incurred under the employment of Scott, the managing partner, to recover a debt due to the Company; but he cited only Johnstone, Scott the other partner having abscond-

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SECOND DIVISION Lord Pitmilly. B.

ed. The Sheriff decerned against Johnstone, who brought an advocation; and the Lord Ordinary having repelled the reasons, he reclaimed, and contended, 1. That the action was incompetent, Scott the other partner not having been sisted; 2. That a number of the items of the account had been incurred after the dissolution of the Company; and, 3. That he had been discharged under a sequestration, on payment of a composition, subsequent to the date of several of the articles in the account. The Court, 'in respect that 'it is stated by the advocator's counsel at the 'bar, that Thomas Scott resides at Whitburn,' advocated the cause, and sisted procedure till he should be cited; and thereafter, in respect Duncan agreed to accept payment of the composition for all items prior to Johnstone's bankruptcy, they decerned against both partners.

Advocator's Authorities.—(1.)—A. v. B., Feb. 28, 1711, (1469); 2 Hal. 646.

T. BAILLIE,—W. DUNCAN, W.S.—Agents.

No. 599.

W. PAUL, MORRISON'S Trustee, *Pursuer*—*E. H. Miller.*

JAMES INGLIS & COMPANY, Defenders.—*Monteriff*—*Buchanan.*

Jan. 20, 1824.

SECOND DIVISION
Lord Cringletie.
F.

Usury—Limitation of Action.—On the 9th of April 1818, the late Mr Maxwell Morrison discounted with James Inglis and Company, bankers in Edinburgh, a promissory-note for £600, at

six months' date. After deducting the legal discount, with the further sum of £.3 as a commission of one-half per cent., the defenders gave Mr Morrison London bills at ninety days' date for the balance, without making any allowance for interest during the currency of these bills, which amounted to £.7 : 5 : 5. The promissory-note became due on the 12th of October 1818, when it was paid by Mr Morrison. On the 11th of August 1819, he executed a summons, on the ground of usury, against Inglis and Company, concluding for the triple penalties under the 12th Anne, c. 16, which was afterwards insisted in by his trustee. Inglis and Company pleaded, in defence, that the action was barred by the 31st of Elizabeth, c. 5, as it had not been commenced within a year from the period of discounting, which, they contended, must be held as the completion of the offence. On the other hand, it was maintained by Morrison's Trustee, that usurious interest had not been taken until the promissory-note was paid; and as this was done on the 12th of October 1818, that the action was brought in proper time. The Lord Ordinary and the Court, by a majority, found the action barred by the statute of limitations, and dismissed it as incompetent.

Pursuer's Authorities.—Maddock v. Hammett, 7. T. R. 184; Mathews v. Griffiths, Peake's N. P. C. 290; Fisher v. Beasley, 1. Douglas, 325; Wade v. Wilson, 1. East. 195; Ferral v. Shaen, 1. Saunders, 295, note 1.; Comyn on Usury, 125-6226; Plowden on Usury, 153.

Defender's Authorities.—Lloyd v. Williams, 3. Wilson, 250; Morrison, June 24, 1808, (F. C.); Comyn, 86-892-3.

T. Walker,—A. Crombie, W. S.—Agents.

No. 600. W. Paul, Morrison's Trustee, Pursuer.—*T. H. Miller.*
J. Inglis & Company, Defenders.—*Moncreiff—Buchanan.*

Jan. 20, 1824.

Second Division
Lord Cringletie.
F.

Usury — Limitation of Action — Process — Amendment of Libel.—This was a case arising out of transactions in reference to four bills of £.200 each, similar to those of the preceding case; but it involved certain other points. An action for the penalties, under the 12th of Queen Anne, had been originally commenced within a year from the discounting of the bills; but it was objected to its relevancy, that the libel did not distinctly specify either the time when, or the place where, the usurious taking had been committed, and that, in other respects, it was laid with great looseness and vagueness. The Lord Ordinary dismissed the action as 'irrelevantly laid.' Against his Lordship's interlocutor, the pursuer gave in a representation, along with which he produced a supplementary summons, which had been executed within a year from the date of the payment of the bills, but beyond a year from the date of discounting; and he prayed to have it conjoined with the original action, or at least received as an amendment of the libel; and he contended that, at all events,

the first action must be held to have interrupted the prescription, under the statute of limitations, so as to render the new summons competent. To this it was answered, that by the statute of limitations, it is declared that all actions commenced after a year from the date of the commission of the offence 'shall be void and null,' so that the new action was quite incompetent, and that an amendment (even if it were a proper amendment, which the new summons was not,) could not be admitted, so as to validate an irrelevant penal action after the period for raising a new action had expired. The Lord Ordinary refused the representation, and dismissed the new action; and the Court adhered, holding the new action to be barred, as in the preceding case.

Pursuer's Authorities.—(Amendment of Libel), Morrison, June 24, 1808, (F. C.); Nisbet and Buchanan, Feb. 1, 1811, (F. C.); Comyn on Usury, 270; (Interruption of Prescription,) 3. Ersk. 7, 38-45.

Defender's Authorities.—(Irrelevancy of first Libel); Plowden, 222; Comyn, 229; Hume on Crimes; Johnston, May 15, 1810, (F. C.); Watt, Feb. 15, 1811, not rep.; (Amendment of Libel); Nisbet, May 29, 1816, (F. C.).

T. Walker,—A. Crombie, W. S.—Agents.

No. 601. J. KIRKLAND & J. F. SHARPE, Suspenders.—*Cuninghame.*
J. RUSSELL, CRAWFORD'S Trustee, Charger.—*Jeffrey—G. Napier.*

Jan. 22, 1824.
FIRST DIVISION. Bill-Chamber. Lords Gillies and Eldin.

Sequestration—Trustee and Heritable Creditors competing. — The question here related to the right of a trustee on a sequestrated estate to receive payment of the price of the heritable subjects, which had been sold, in preference to the heritable creditors, and also as to their liability for the expense of the sequestration. The Lord Ordinary passed a bill of suspension at the instance of the purchasers, and the Court refused a petition.

Charger's Authorities.—54. Geo. III. c. 137, § 38-42-45; 2. Bell, 450, 453, and Cases there; 4. St. 16, 3, 4; Ersk. 3, 23; 2. Bell, 538.

GREIG & PEDIE, W. S.—G. NAPIER,—Agents.

No. 602. C. FALCONER, CAMPBELL'S Trustee.—*A. Wood—Gillies.*
C. CAMPBELL, M'MATH'S Trustee.—*L'Amy.*
Competing.

Jan. 22. 1824.
FIRST DIVISION. Lord Meadowbank. D.

Competition—Compensation.—Campbell of Silvercraigs having sold his estate, the purchaser retained about £.1500 of the price, for certain purposes. On the 21st of June 1803, Campbell being then indebted to M'Math, drew a bill in his favour upon the purchaser for £.1500. Acceptance having been refused, it was protested on

the 21st of November 1823. Nine days prior to this protest, Campbell executed a trust-deed for behoof of creditors, on which infeftment was taken; but it was not intimated to the purchaser, and it was not acted upon. Two years thereafter, he executed a new trust-deed, under which Falconer acted as trustee. In that character, in 1811, he sold a property to M'Math, for which he received a bill for £.682. M'Math's estate was afterwards sequestrated under the bankrupt act; and in a multiplepoinding brought by the purchaser of Campbell's estate, the trustee for M'Math claimed to be preferred on the bill for £.1500, under deduction of certain payments. This was opposed by Falconer, who maintained, 1. That the bill afforded no preference, as it was not protested till after the date of the first trust-deed: And, 2. That he was entitled to set off the bill for £.682 against it. To this last plea it was answered, that there were no termini habiles for compensation, and that if sustained, it would operate as a preference over the creditors of M'Math. The Lord Ordinary preferred the trustee for Mac-Math's creditors, and the Court adhered.

CAMPBELL & CLASON, W. S.—C. STUART, W. S.—Agents.

No. 603.

Miss Panton and Others.—*Graham Bell.*

A. Gillies and Others.—*Cay.*

Competing.

Jan. 22, 1824.

First Division. Lord Meadowbank. D.

Legacy.—The late Miss Duncan left a trust-settlement for payment of debts and legacies; and on her death, there were found in her desk a variety of bills and deposit receipts, and two documents, the one of which was in these terms: '1820. The bill within this paper you will give, '£.100, to Miss Jane Panton, £.50 to Janet, 'Martin, my servant, £.5 to my girly Kitty Mar-'tin, to receive after my death, St. L. Duncan.' This document was holograph of Miss Duncan; but although bills were lying near it, none of them were attached to it. The other document was in these terms: 'September 15, 1820. The bill 'within this paper you will give Miss Panton, '£. 100, Janet Martin, my servant, £.100, to 'Kitty, my girly, £. 5. The is more if Miss 'Mackie's serve be with at time, let have the 'remaining £. 3. St. L. Duncan; Belfield, 'Oct. 26, 1821.' With the exception of the words 'the remaining £. 3,' and 'Belfield, 'Oct. 26, 1821,' this document was in Miss Duncan's handwriting; and it was found pinned to a deposit receipt by Sir William Forbes and Company, dated 15th September 1821, for £.208, being the exact amount of the sums contained in it. In a multiplepoinding, brought by the trustees, Miss Panton, the two servants named in the writing, and Mary Cameron, the person designed

as Miss Mackie's servant, claimed to be preferred for the sums in the two documents. The Lord Ordinary found, that Miss Panton and others 'have no right to be preferred upon the trust-'funds, in virtue of the slips claimed upon, in 'respect the legacies bequeathed by those slips 'are of the nature of special legacies, and the 'subjects to which they apply must be held to 'have perished.' The Court, however, unanimously altered as to the sums contained in the second document, and sustained the claims of Miss Panton and others to that extent; but adhered quoad ultra.

Panton's Authorities.—3. Ersk. 2, 23; Colman, 2. Vesey jun. 639.
Gillies's Authorities.—St. 526; Kerr, Jan. 1, 1708; (16958.)

J. Hannah, W. S.—D. Wilson, W. S.—Agents.

C. Falconer and Others, Pursuers.—*Baird.* No. 604.
J. Wright, Defender.—*M'Farlane—Moncreiff.*

Jan. 22, 1824.

First Division.
Lord M'Kenzie.
S.

Fiar or Liferenter.—M'Arthur was heir-apparent to certain lands, and obtained a disposition from his father to them, under burden of various debts. Before he made up titles, he entered into an antenuptial contract with Miss Moncrieff, by which he disponed the property 'to and in 'favour of himself in liferent, for his liferent use 'allenarly, and the children or bairns of the mar-'riage equally amongst them, share and share 'alike, (but under the reservations, powers, and 'declarations after mentioned) in fee; whom 'failing, to his own nearest heirs and assignees

'whomsoever.' He provided an annuity of £100 to his wife, reserving power to himself 'to dispone the whole foresaid lands to the eldest son of 'the said marriage, or to divide the same amongst 'the children of the marriage, in such other proportions as he may think proper.' As also 'to sell and dispose of the foresaid lands, or any 'part or portion thereof.' He bound himself 'to infeft and seise himself in liferent, for his 'liferent use allenarly, and the heirs particularly 'before named, in fee; but under the reservations and conditions before mentioned,' and also to make up titles as heir to the property. In the precept of sasine, he granted warrant to infeft himself, in the same terms as in the dispositive clause. Mr M'Arthur made up titles as heir, and was infeft, and thereafter infeftment was taken on the contract of marriage, which was fully narrated in the body of the instrument of sasine. There was no infeftment in favour of the children nascituri, the bailie having given to M'Arthur 'in liferent, for his liferent use allenarly, (but under the reservations, powers, and declarations 'before mentioned,) heritable state and sasine, 'actual, real, and corporal possession,' and to the wife infeftment in her annuity. Of the marriage there was one child; and after the death of his wife, M'Arthur having become insolvent, executed a trust-deed, in favour of Falconer and others, for behoof of his creditors. The fee having been claimed on behalf of the child, (to whom Mr Wright was appointed tutor ad litem,) the trustees brought an action of declarator, to have it

declared that the fee belonged to M'Arthur, and had been effectually conveyed to them. The Lord Ordinary found, that M'Arthur having acquired the subjects by succession, and that having, in virtue of that right, been infeft, the fee must be held to remain in him, unless it was validly taken out by the marriage-contract; 'that the sasine taken upon the said contract and disposition is so expressed, that it cannot have the effect of conveying the fee of the said lands out of the said Robert M'Arthur, or even changing it into a fiduciary fee in his person; and, therefore, that the property of the said lands was validly conveyed to the pursuers, and is disposable by them, in terms of the trust-disposition in their favour.' The Court adhered.

All the Judges were of opinion, that the intention to provide the fee to the children was clear; but a majority held that this had not been validly executed,—that this case was different from that of Newlands, because M'Arthur had an unqualified title, independent of that created by the contract of marriage, whereas Newlands had only one title, in which his right was expressly limited.

Pursuer's Authorities.—Graham, July 4, 1759, (6931); M'Nab, Feb. 24, 1821, (not rep.)

Defender's Authorities.—2. St. 10, 2; 2. St. 3, 58; 2. Ersk. 3, 49; Newlands, July 9, 1794, (4289); Allardyce, March 5, 1795; (Bell, 156).

FALCONER & JOHNSTON, W. S.—TOD & WRIGHT, W. S.—Agents.

No. 605.

A. DUNCAN, Pursuer.—*M'Farlan.*
M. S. FEA, Defender.—*Cockburn—Marshall.*

Jan. 22, 1824.
SECOND DIVISION
Lord Cringletie.
M'K.

This was an action at the instance of Duncan, a writer, for the recovery of certain title-deeds belonging to a client, which he had lent to the defender Fea, on a written receipt, containing a promise to return them when required. The Lord Ordinary and the Court decerned in terms of the libel.

W. DICKSON, W. S.—A. MANNERS, W. S.—Agents.

No. 606.

W. CRAIG, Suspender.—*Shaw.*
D. WARDROP, Charger.—*Monteith.*

Jan. 23, 1824.
SECOND DIVISION
Bill-Chamber.
Lord Eldin.
F.

Bill-Chamber—A. S. June 14, 1799.—Craig presented a bill of suspension, which, on being advised with answers, was passed on caution. He reclaimed, in so far as he was ordained to find caution; and stated, that the charger had deprived him of an opportunity of being heard by the Lord Ordinary as to passing the bill without caution, by not having intimated the lodging of the answers, in terms of the Act of Sederunt. The Court, in respect of the irregularity in not intimating the lodging of the answers, remitted to his Lordship to hear parties relative to caution.

C. FISHER,—G. DUNLOP, W. S.—Agents.

H. M'QUEEN, Complainer.—*Dean of Faculty Cranstoun—Moncreiff—Buchanan.*
J. NAIRNE, Respondent.—*Solicitor-General Hope—Thomson—H. J. Robertson.*

No. 607.

Jan. 23. 1823.

SECOND DIVISION F.

Freehold Qualification—Registration of Sasine.—At the Michaelmas head court of the county of Inverness in 1822, Nairne was enrolled as a freeholder, in virtue of these titles;—viz. a disposition, which, 'in consideration of the friendship 'and regard' of the granter, conveyed to him in liferent, 'the superiority' of certain lands; a corresponding charter, dated 3d February 1821, also granting merely the 'superiority;' and instrument of sasine following thereon, of date April 10, 1821, bearing that infeftment was given 'præfa-'tæ superioritatis.' The sasine was recorded on the 18th of April 1821. In the minute-book the date of the sasine was correctly entered; but in the record itself, by a clerical omission of the word 'primo,' the infeftment appeared to have been taken on the 10th April 1820, instead of 1821, the true date. The year of the King's reign was correctly transcribed into the record, as were also the dates of the charter and precept, as engrossed in the instrument of sasine. M'Queen, a freeholder, complained against Nairne's enrollment, on the grounds, 1. That his vote was nominal and fictitious; 2. That a conveyance of, and infeftment in the mere 'superiority' was inept; and, 3. That the sasine was not duly recorded, the mistake in transcribing the date being an es-

sential error, which must be fatal to it. As Macqueen founded his objection of nominal and fictitious solely on the conveyance being gratuitous, and declined to put any interrogatories to Nairne as to confidence, &c. the Court at once repelled that objection. After a hearing in presence on the other two points, the Court being satisfied that the objection to the registration was well founded, waved deciding the question as to the effect of a conveyance of superiority, and ordained Nairne's name to be expunged from the roll of freeholders.

Their Lordships were satisfied, that it was impossible for any one not to perceive and correct the error in this case, by an inspection of the record and minute book; but, at the same time, they held it to be of the utmost importance, to preserve the purity of the record, the more especially as an extract was, by the act 1617, equally as probative as the original itself. It was admitted on all hands, that freeholders were entitled to found on the act 1617, as well as singular successors.

Complainer's Authorities.—1617, c. 16; 16. Geo. II. c. 11, § 10; 2. Craig, 7, § 11, 12, 13; 2. Stair, 3, 17; 2. Ross, 181; Ro. Bell, 156; 1. Sir George Mackenzie, 380; Gray, Feb. 25, 1790, (8796); Drummond, June 24, 1809, (F. C.); Monro, March 9, 1811, (F. C.).

Respondent's Authorities.—1695, c. 14; 2. Craig, 3, § 11, 12; Wight, 221.

H. M'Queen, W. S.—J. & C. Nairne, W. S.—Agents.

J. SPEID, Advocator.—*Solicitor-General Hope*
—*Neaves*. No. 608.
TRUSTEES OF ALLARDYCE, Respondents.—*Skene*.

Expenses.—The inferior court found Speid liable in expenses, as he delayed to produce his titles till a late period of the cause; and the Lord Ordinary and the Court adhered.

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FIRST DIVISION.
Lord Meadowbank.
D.

T. DEUCHAR,—J. MORRISON, W. S.—Agents.

J. LOGAN, Pursuer.—*Cockburn*—*Maitland*. No. 609.
A. BUCK, Defender.—*Jardine*—*D. Maitland*.

Process.—Logan brought an action against Buck, concluding for repetition of £. 100, and for £. 26 as the expense of removing certain rubbish. The Lord Ordinary, after certain special findings relative to the £. 100, appointed Logan 'to lodge in process an account, made up on the 'principles of this interlocutor.' Buck presented a petition to the Inner-House, which was ordered to be answered; and the Court thereafter adhered, nothing being said relative to expenses. The case then returned to the Lord Ordinary, who gave an interim decree for £. 50, being the amount due on the principles of his interlocutor. The defence as to the £. 26 having been given up, Logan moved for expenses. This was opposed by Buck, who maintained that they could not competently be given, seeing they had not been found due by the Inner-House; but the Lord Ordinary, in respect of the case of Taylor,

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FIRST DIVISION.
Lord Alloway.
H.

found, 'that the consideration of the question of 'expenses is not precluded by the Court having 'advised the petition and answers upon one point 'of the cause, when the whole cause afterwards, 'from the state of the process, necessarily return-'ed to the Lord Ordinary,' and decerned for expenses. The Court adhered.

Pursuer's Authorities.—Taylor, June 9, 1821, (ante, Vol. I. No. 77.); Mackenzie, Nov. 16, 1821, (ante, Vol. I. No. 177).
Defender's Authorities.—Campbell, May 21, 1803, (App. No. 3. Exp.); Falconer, March 4, 1815, (F.C.); Shearer, May 17, (1805, ante, Vol. II. No. 294).

J. ADAMS,—J. HERIOT, W. S.—*Agents.*

No. 610. J. COWAN, Pursuer.—*Forsyth—Jeffrey.*
J. LYON, Defender.—*Baird.*

Jan. 24. 1824.
FIRST DIVISION. Lord Meadowbank. S.

This was a question of expenses. The Lord Ordinary and the Court found them due to neither party.

J. HATHORN,—D. WILLIAMSON, W. S.—*Agents.*

No. 611. R. HAMILTON, Complainer.—*Solicitor-General Hope—Dickson.*
LORD ARCHIBALD HAMILTON, Respondent.—*Dean of Faculty Cranstoun—Jardine.*

Jan. 24, 1824.
SECOND DIVISION F.

Freeholder—Sasine.—At the Lanarkshire Michaelmas head court, Mr Hamilton claimed to be enrolled as a freeholder, in virtue of a disposition dated 19th August 1822, and sasine following thereon. The instrument of sasine bore, that

'on the 5th of September 1822,' there compeared the attorney of the complainer, 'holding a 'disposition, of date the 19th of August,' &c. (but not specifying of what year), and that sasine was given thereon. It was objected by Lord Archibald Hamilton to the enrollment, that it did not appear from the instrument that sasine had been taken on the disposition dated 19th August 1822, specified in his claim. It was answered, that according to the ordinary rules of construction, the 19th of August mentioned in the sasine as the date of the disposition, must necessarily mean the 19th of August 1822, the year set forth in the beginning of the instrument, and the only one mentioned in it. The freeholders sustained the objection; but, on a complaint at Mr Hamilton's instance, the Court found that they had done wrong, and ordained his name to be added to the roll.

Complainer's Authorities.—Adam, June 12, 1810, (F. C.); Bell on Election Law, 249 to 261, and cases there referred to.

Respondent's Authorities.—Dalrymple, Feb. 8, 1781, (Wight, Supplem. p. 19); Munro, March 9, 1811, (F. C.).

J. Hamilton, W. S.—R. Rutherford, W. S.—Agents.

Jean Brown, or Monkhouse, Advocator.—*Maitland.*
M. Gilfillan and Spouse, Respondents.—*Jeffrey—Cuninghame.*

No. 612.

Jan. 27, 1824.

First Division. Bill-Chamber. Lord Eldin. H.

Process—Bill-Chamber—Advocation.—Monkhouse raised an action in the Commissary-Court of Glasgow, against Gilfillan and Spouse, for da-

mages, on account of alleged slander. After being called, the action was allowed to fall asleep, and a new process was instituted in the Court of Session. Among other pleas, Gilfillan and Spouse stated, in defence against this latter action, lis alibi pendens, by the existence of the process in the inferior court, of which they immediately brought a summons of wakening. The Commissary found that they were entitled to insist, either that the process before him should be carried on, or that it should be abandoned, and decree of absolvitor pronounced. Immediately after this interlocutor was pronounced, Monkhouse presented a bill of advocation ob contingentiam, but she did not lay the process before the Lord Ordinary. His Lordship having immediately passed it, Monkhouse, on the same day, without giving any notice to the opposite party, expede the letters. On being informed of this on the following day, Gilfillan and Spouse applied to the Lord Ordinary for a sist, which was granted; and thereafter presented a petition to the Court, praying that the letters might be recalled. In support of this they stated, that there was no contingency; that the proceeding had been resorted to as an improper device to deprive them of a defence; and that it was irregular in point of form, as the process had not been laid before the Lord Ordinary, and no intimation had been given to their agent prior to the letters being expede. The Court, for these reasons, recalled the letters, and found Monkhouse liable in expenses.

W. Guthrie,—A. P. Henderson,—Agents.

Miss Sivright.—*Dean of Faculty Cranstoun—Fullarton.*

Major C. Dallas.—*Irvine—Jardine.*

Competing.

No. 613.

Competition—Provision to Children nascituris—Power of Division.—In 1782, David Sivright married Elizabeth Dallas, and soon thereafter a contract was entered into between his mother and her father, by which they each agreed to advance £600, to be vested in trustees for behoof 'of the said David Sivright and Elizabeth Dallas in conjunct fiferent, and to the children to be procreated of the said marriage in fee.' Besides various provisions as to the disposal of this fund, adapted to different contingencies, it was declared, 'that it shall be in the power of the said David Sivright or Elizabeth Dallas, by a writing under their or either of their hands, at any time of their lives, to proportion and divide the foresaid provisions among the children to be procreated of this marriage, and failing such division, the same shall be equally divided among them.' The two sums of £600 were accordingly placed in the hands of trustees, and thereafter a son and daughter were born of the marriage. The trustees having died, the fund was, on an application to the Court, entrusted to a factor loco tutoris. The son died, leaving a daughter, (one of the competitors); and thereafter Mrs Sivright also died, without having exercised the power of division. On this event, Mr Sivright executed a deed of division, by which, after narrating the

Jan. 27, 1824.

First Division.
Lord Gillies.
H.

contract, and that the fund belonged to his children, he allocated £.1000 to his own daughter, and £.200 to the daughter of his son. He communicated to his daughter the terms of this deed, which he deposited with his agent. His daughter afterwards executed a testament, in which, after stating that she was under great obligations to her uncle Major Dallas, (the other competitor,) she bequeathed to him 'the sum of £.1000, which 'has been lately given to or settled upon me.' About a month thereafter she died, and Major Dallas thereupon transmitted a copy of her testament to her father. On receiving it, that gentleman wrote to his agent, stating that he had received information from Major Dallas, that his daughter 'had left him sole heir to £.1000 settled upon her by a deed in your hands, and 'which is revocable by me.' He therefore requested him to 'revoke the same in such manner 'as you may think proper, as the money must 'now belong to the child of my own, agreeable to 'the intention of my mother and Mr Sivright to 'father, as, although I gave her the largest part 'of the money, I do not think that I have a right 'to permit it to go past her nieces, whilst I have 'the power to prevent it.' The agent cancelled the deed of allocation by scoring it across, and tearing away the subscriptions. Mr Sivright did not execute any other deed relative to the contract; and on his death, a competition arose between his son's daughter, Miss Sivright, and Major Dallas. A process of multiplepoinding having been brought by the son of the factor loco

tatoris (who was also dead,) Miss Sivright maintained, that Major Dallas could have no right, because the contract did not vest the fee in either of the children of the marriage, but only in them as a body,—that no specific share could belong to either of them except in virtue of a deed of division and allocation,—that the one which had been executed by Mr Sivright was in its nature revocable, and had been cancelled, and consequently as his daughter had no specific vested interest, she could not transmit any part of the fund;—that being the sole existing issue of the marriage, and as, at all events, Mr Sivright had, by his letter to the agent, allocated the whole fund to her, she was entitled to be preferred to the fund in medio. On the other hand, Major Dallas contended, that each of the children of the marriage had a vested fee,—that the amount had been irrevocably fixed by the deed of division, and therefore that he was entitled to be preferred for the legacy of £1000;—or, at least, if the deed of division was to be held as cancelled, then the power had not been exercised, and he, as in right of the daughter, was entitled to one-half of the fund.

The Court, on the report of the Lord Ordinary, at first preferred Miss Sivright to the whole fund in medio, but thereafter altered, and found Major Dallas entitled to one-half, and afterwards adhered.

The Judges were of opinion, that there was a fee vested in the son and daughter; but the chief difficulty which they entertained related to the exercise of the

power of division. They at last held that it had not been duly exercised, and that the sum must be equally divided.

Mr Dallas's Authorities.—(1.) Gibson, Feb. 4, 1726, (11481); Fortesfield, Dec. 9, 1760, (12874); Christie, Jan. 21, 1806; (No. 5, 22, Prov. to Heirs); Campbell, Dec. 7, 1717, (6342); Dalzel, Mar. 11, 1756, (16204); 8. Com. Dig. 1012.
Sinright's Authorities.—Bell's Cases, 412.

R. STRACHAN, W. S.—W. DALLAS, W. S.—Agents.

No. 614. URE and MILLER, Complainers.—*Bell—Walker.*
W. JEFFREY, Respondent.—*Dean of Faculty Cranstoun—Greenshields.*

Jan. 27, 1824.

SECOND DIVISION M'K.

Sequestration—Trustee.—The estate of Jamieson having been sequestrated under the 33. Geo. III. c. 74, and Jeffrey elected trustee, Ure and Miller claimed as creditors. Their claim was received; but Jeffrey objected to it, that they held goods belonging to the bankrupt exceeding its value. During a litigation relative to the disposal of these goods, Jeffrey at the statutory periods drew up and announced two schemes of ranking and division. These were entered in the sederunt-books, and consisted of several columns, four of which were titled at the top as follows: 1. 'Amount claimed;' 2. 'Amount continued;' 3. Neat amount of claims ranked;' 4. 'Dividends.' In the first scheme the claim of Ure and Miller was entered in the first column, but was not carried out to the third or fourth; and in the second column the words 'holds goods' were written opposite to their claim. Again, in the

second scheme, their claim was entered in the first column only. No explicit rejection, however, of the claim was made in any of these schemes; and Ure and Miller at last succeeded in getting a decree for the balance, after deducting the price received for the goods. Jeffrey having paid away the whole funds of the estate, an action was raised against him by Ure and Miller, for the dividends corresponding to the debt found due to them, on the ground, that if he had not retained funds, he was bound to have done so. He pleaded in defence, that according to the practice of trustees under the former bankrupt act, the manner in which Ure and Miller's claim was entered in the schemes of division was sufficient to certify them that the trustee had rejected their claim, and had refused to set apart a dividend; and accordingly that they ought to have complained of his judgment in due time. The Court remitted to three accountants in Edinburgh, and three in Glasgow, to report whether the entries in the schemes recorded in the sederunt-book were sufficient to express the judgment of the trustee refusing to rank Ure and Miller's claim. The Edinburgh accountants reported that they were not sufficient, and the Glasgow accountants that they were, and a majority of the Court concurring in the opinion of the former, they found Jeffrey 'liable to the 'complainers for the dividends, which they were 'entitled to draw from the bankrupt estate, with 'interest.'

D. Cleghorn, W. S.—J. R. Skinner, W. S.—Agents.

No. 615. J. Russell, Assignee of T. Alston, Pursuer.—*Dean of Faculty Cranstoun—More.*
A. Mather and T. Peacock, Defenders.—*Gordon.*

Jan. 27. 1824.

SecondDivision
Lord Cringletie.
M'K.

Bill of Exchange, Transmission of.—Mather and Peacock accepted a bill for £50 in favour of Alston the drawer, who indorsed it to Macallum. By him it was indorsed to Elliot, and by him to J. and R. Watson, bankers, by whom it was protested, and noted for non-payment; but no instrument was extended. Macallum retired the bill from J. and R. Watson, who marked on the back, 'Received payment from Mr D. Macallum. After the lapse of five years, an action was raised on the bill against the acceptors, by Russell, as assignee of Alston the drawer, into whose possession it had come, without any re-indorsation but receipt by Macallum, and with the indorsations and Watson's receipt scored. Mather and Peacock, the acceptors, alleged in defence, that the bill had been retired from J. and R. Watson by Macallum, as their agent, and with money given to him by them for that purpose; that it had afterwards come into Alston's hands by inadvertency; and they contended, that the circumstance of the indorsations being scored was not sufficient to re-invest Alston; that Russell, his assignee, could not claim the privileges of a bona fide onerous holder, and was bound to shew that Alston had truly acquired right to the bill, or, at least, that they were entitled to prove their allegations prout de jure. The Lord Ordinary,

'in respect that the bill in question was noted, 'and after that retired by Macallum, the indor- 'see immediately posterior to Alston; that there 'is a receipt on the back of the bill by the hold- 'ers thereof, bearing the money to have been paid 'by Macallum; that there is no evidence of Al- 'ston, the drawer, having paid the money to 'Macallum by a receipt on the bill, or in any 'other way than simply his being in possession 'thereof; and, lastly, that there was no protest 'ever extended, and the bill was allowed to re- 'main unpursued for during five years after its 'term of payment, found that Mr Alston is not 'entitled to the privileges of the drawer of a bill, 'who can shew that he has paid the contents of 'it, by a regular recourse upon him, in conse- 'quence of the non-payment thereof;' and he allowed the respondents to prove their allegations by the writ or oath of Macallum. Russell reclaimed, but the Court adhered.

The Court unanimously concurred in the rationes contained in the Lord Ordinary's interlocutor, which, however, they considered to be scarcely sufficiently favourable to the defenders; and they were clearly of opinion, that the mere scoring of indorsations, without any evidence of an intention to reconvey, is not sufficient to reinvest the indorser.

Pursuer's Authorities.—Hamilton, Jan. 31, 1724, (1403); Fairholme, Jan. 7, 1752, (1474); Glen on Bills, 134.

Defenders' Authorities.—Chitty, 398; Bayley, 372; Glen, 163; Ferguson, Nov. 29, 1793, (1488); Allan, March 5, 1800, (F. C.).

D. Scales,—J. S. Hall, W. S.—Agents.

No. 616. J. LENNOX, Pursuer.—*A. Dunlop jun.*
D. ROSE and Others, Defenders.—*Solicitor-General Hope—Lockhart.*

Jan. 28, 1824.

FIRST DIVISION. Lord Meadowbank.

Reparation—Excise Statutes.—Lennox raised an action against Rose and others, Excise-officers, stating, that, early on the morning of the 26th September 1822, he was called out of his dwelling-house by them to lend a hat to a prisoner who was in their custody; that after having done so, they took offence at some expressions which he used, and threatened, in revenge, to search his house; that he stated his willingness to allow this, provided they shewed a legal warrant; but that he was resolved to resist if they could not; that, after having retreated into his house, they loaded their fire arms, and, without exhibiting any warrant, broke down his doors, violently assaulted him, took him prisoner, and carried him handcuffed to an inn at Dumbarton, where they liberated him; that they had no warrant against him; that nothing seizable had been found in his house; and concluding for damages. He gave notice of his intention to raise action on the 25th November; his summons was dated and signeted on the 13th December, and was served on the 26th. In defence it was pleaded, 1. That the action had not been raised within three lunar months from the date of the alleged assault: And, 2. That they had not received a month's notice prior to issuing 'out the writ,' which they stated was equivalent to our signeting, and therefore the action was incompetent, by the 23. Geo. III. c. 70, and 28. Geo.

37. To this it was answered; 1. That it had been raised within three calendar months; 2. That the service was the same with 'suing out the 'writ;' and, 3. That to ascertain whether the defenders had acted, not colore, but virtute officii, the facts must be investigated. The Lord Ordinary, 'in respect of the allegations made by 'the defenders, founded upon the clauses in the 'statutes,' dismissed the action as incompetent, and found the pursuer liable in triple expenses. Lennox reclaimed, and, after the Court had unanimously ordered the petition to be answered, the defenders gave in a note declining to lodge answers. The Court, therefore, recalled the interlocutor, remitted the case to the Jury Court, and found expenses due.

Pursuer's Authorities.—(1.)—1. Com. Dig. 336; Tomlin v. Writ; 5. Blackst. 979; Chitty on Com. 806.—(3.)—2. Esp. N. P. 542; 4. Geo. IV. c. 74, § 113; 2. Bosq. & Puller, 158; 3. Bar. 1742; 2. Maule & Sel. 159; 4. T. R. 284; 5. East, 233; Chitty on Com. 808; Anderson & Co. Feb. 28, 1811, (F. C.).

Defender's Authorities.—5. T. R. 1; 9. East. 364; 3. Camp. 242; 1, Barn. & Ald. 227; Grant, Feb. 6, 1810, (F. C.).

J. Tyrrell, W. S.—D. Horne, W. S.—Agents.

A. White, J. Young and Company's Trustee, Petitioner.—*Ivory.*
P. Cooper, Respondent,—*More*—*Brownlee.*

No. 617.

Jan. 28, 1824.

Second Division M'K.

Sequestration—*Commissioner.*—This was an application at the instance of White, trustee on the sequestrated estate of J. Young and Company, to have the election of Couper as a commissioner declared null, on the ground that he was not a creditor, but only mandatary and attorney of a cer-

tain foreign creditor. It was contended for Couper, that it was the uniform practice for attorneys of foreign creditors to act as commissioners on sequestrated estates; but the Court found the election null, and granted warrant to elect a new commissioner.

Petitioner's Authority.—Brown, Nov. 25, 1809, (F. C.).

R. Y. Anderson, W. S.— —Agents.

No. 618. J. Mill, Pursuer.—*Solicitor-General Hope—Forsyth—Burn Murdoch.*
Magistrates of Montrose, Defenders.—*Dean of Faculty Cranstoun—Jeffrey—Monorieff—Ivory.*

Jan. 28, 1824.

Second Division. Lord Cringletie. F.

Burgh—Title to pursue—Personal Objection.—The sett of the burgh of Montrose having expired, in consequence of the election of Magistrates for 1816 having been declared null, an application was made to the King in Council for a restoration of the burgh franchise, in the name of the 'guild-'brethren, burgesses, trades, householders, and 'other inhabitants.' A royal warrant was accordingly issued, authorising a poll election of Magistrates for the year 1817, and granting a new sett of the burgh, by which, among other alterations of the former sett, the right of electing councillors, which by the old sett had been vested in the council itself, was given to the members of the trades and guildry. Under this warrant the magistracy of the burgh was renewed in 1817; and the subsequent elections in 1818, 1819, and 1820, were made agreeably to the provisions of the new

sett. In 1821, Mill, a guild-brother, and who had voted as such at these elections, raised an action, calling the Magistrates and Officers of State, concluding for reduction of the royal warrant, and containing various declaratory conclusions. Appearance was made for the Magistrates, who objected, 1. That Mill was barred personali exceptione from challenging the new sett, by not having opposed the application to the King in Council, and by having used the privilege, conferred on him by the royal warrant, of voting at the elections of Magistrates, and which he had not possessed under the old sett. 2. That, as an individual burgess, he had no title to pursue an action similar to the present; and that, as the new sett conferred additional privileges to those which he had formerly enjoyed, he had no interest to reduce it: And, 3. That the guildry and trades, who were chiefly interested in supporting the sett, and were the proper parties, had not been called. On report of the Lord Ordinary, the Court repelled the objections to the pursuer's title, and remitted to his Lordship to proceed accordingly.

Four of the Judges were of opinion, 1. That a burgess, by acting under an existing sett, does not bar himself from afterwards challenging it; 2. That every individual burgess has an interest and title to insist that the burgh shall be legally governed; and, 3. That the objection, as to the proper parties not having been called, could only be listened to as a defence on the merits. Lord Pitmilly, however, held that Mill's right to challenge was barred personali exceptione.

Pursuer's Authorities.—1,—Archbishop of St. Andrew's, March 12, 1684,

(4699); Chalmers, Feb. 27, 1668, (4698);—9.—Anderson v. Magistrates of Wick, Feb. 17, 1749, (1842); Anderson v. Magistrates of Renfrew, June 30, 1752, (16123).

Defender's Authorities.—(1.)—Livingston, July 13, 1666, (10435); Cuningham, Dec. 12, 1820, (not rep.); Mason, Nov. 15, 1821, (ante Vol. I. No. 173);—(2.)—Burgesses of Inverury, Dec. 14, 1820, (F. C.); Cowan, June 23, 1782, (16723).

P. Cook, W. S.—Gibson, Christie & Wardlaw, W. S.—Agents.

No. 619. TAY FERRY TRUSTEES, Advocators.—*Jeffrey—Moncreiff—Rutherfurd.*
A. CAMPBELL STEWART, Respondent.—*Anson.*

Jan. 29, 1824.

FIRST DIVISION. Bill Chamber. Lord Mackenzie. D.

Advocation—Stat. 59. Geo. III. c. 118.—3. Geo. IV. c. 76.—By these statutes, various powers are conferred upon Trustees for regulating the ferries upon the river Tay; and, in particular, authority is given to them to change their situation. The principal ferry had hitherto been from Dundee on the north, to Newport and Woodhaven on the south. But the Trustees, on the 20th July 1822, resolved to abandon the Woodhaven Ferry, which was immediately carried into effect. Mr Stewart was proprietor of Woodhaven, where he had erected an inn, and other accommodations, for the use of the ferry. By a clause in the statute, it is enacted, that the Trustees shall be bound to pay to certain individuals, one of whom was Mr Stewart, 'or any other person or persons 'in their rights, any loss or damage which he, 'they, or any of them, may sustain, for or on account of the station or harbour for the said ferry on the south side of the river Tay, herein

'after authorised to be erected and established, 'being used either solely or occasionally for the 'purposes of the said passage, in place of the 'harbours of Newport and Woodhaven respec- 'tively.' These damages are ordered to be ascertained by the verdict of a jury, summoned by the Sheriff of the county; 'which jury shall inquire 'of, assess and ascertain the sum or sums of 'money to be paid, &c. or the recompence to be 'made for the damages that shall or may be sus- 'tained as aforesaid; and the said Sheriff shall give 'judgment for such recompence so to be assess- 'ed by such jury; which said verdict, and the 'judgment thereon pronounced as aforesaid, shall 'be signed by the said Sheriff, and shall be bind- 'ing and conclusive to all intents and purposes, 'and shall not be liable to review by advoca- 'tion, suspension, reduction, or otherwise.' Mr Stewart having presented an application to the Sheriff to have his damages ascertained in the mode pointed out in the statute, the Trustees objected to a remit to a jury, on the ground, 1. That he had produced no title to pursue; and, 2. That his claim, as condescended on, was not relevant. The Sheriff issued his warrant to summon a jury, and refused to sustain the objections, 'in respect that the only right which the Sheriff 'has to interfere in this case is in virtue of the 'powers conferred on him by the statute libelled 'on; and in respect that the powers of the She- 'riff under it are purely ministerial, directing 'him to summon a jury to inquire of, and assess 'the compensation to be paid to any party, al-

'leging that he is aggrieved by the operations 'of said Trustees; but that it gives him no 'power to decide questions of relevancy.' Against this interlocutor the Trustees presented a bill of advocation, which the Lord Ordinary refused as incompetent, in respect (as stated in a note) that it must be held so, unless the Sheriff had ordered a jury to be summoned in a case for which the act did not authorise him; that he conceived the expression of the Sheriff, that his functions were merely ministerial, was too strong; because he must judge before summoning a jury whether a case, on which the application is founded, be under the statute, but that he is not bound to go farther; and that he appears to have observed this rule. The Court being satisfied that there could be no doubt as to Mr Stewart's title, adhered.

A. STORIE, W. S.—J. YULE, W. S.—Agents.

No. 620. TAY FERRY TRUSTEES, Advocators.—*Jeffrey—Moncreiff—Rutherfurd.*
A. MERCHANT and D. BROWN, Respondents,—*Cockburn—Neaves.*

Jan. 29. 1824.
FIRST DIVISION. Bill-Chamber. Lord M'Kenzie. D.

Advocation—Stat. 59. Geo. III. c. 113.—2. Geo. IV. c. 76.—This case was connected with the preceding one. The respondents were the tenants in the inn at Woodhaven, belonging to Mr Stewart, and claimed damages for the loss which they alleged they had suffered by the alteration of the ferry. This was opposed by the Trustees, on

grounds similar to those on which they rested in their case with that gentleman; and farther, that the action was incompetent, as notice had not been given of the claim in due time. By the first statute it was enacted, that no complaint was to be received 'unless application shall have been 'made, in relation thereto,' to the Trustees, 'ten 'days at least before such complaint shall be made 'to the said Sheriff, within the space of two ka-'lendar months next after the time that such 'supposed injury or damage shall have been sus-'tained, or the doing or committing thereof shall 'have ceased.' This provision was not renewed in express terms by the second statute; but reference was made by the one to the other. The resolution to abandon Woodhaven was made on the 20th July 1822; and on the 18th of September thereafter, a letter was written by the respondents to the agent for the Trustees, claiming damages generally. The Sheriff summoned a jury; and, for the reasons stated in the case with Mr Stewart, declined to listen to the objections to the relevancy; and the Lord Ordinary and the Court refused the bill of advocation.

A. Storie, W. S.—J. & A. Smith, W. S.—Agents.

Col. Bruce, Pursuer.—*Baird—H. Bruce.*
J. P. Grant and his Tenants, Defenders.—*Fullerton—Moncreiff.*

No. 621.

Jan. 29, 1824.

First Division.
Lord Alloway.

Real Burden—Mails and Duties.—In 1811 Mr Grant sold a redeemable annuity during his life

H.

to Colonel Bruce, and in security of it infeft him not only in the annuity itself, payable out of the lands of Kinloss, but also in the lands, and assigned the rents. Colonel Bruce intimated his assignation in 1822, and immediately executed a summons of mails and duties, alleging that there were arrears due to him. It was denied by Mr Grant that there was any arrear at the date of the assignation; and it was alleged by him, that an arrear had since been created, by the intimation to the tenants of the assignation; and that it was incompetent to bring an action of mails and duties for subsequent annuities. The Lord Ordinary, however, found an arrear due, and decerned for certain bygone rents, 'and for all subsequent 'rents that have fallen due, until the sums due, 'and to become due to the pursuer, shall be sa-'tisfied and paid.' The Court adhered.

Pursuer's Authorities.—5. St. 1, 6; 1. Dict. 338.

J. Kerr, W. S.—Lyon & Blackadder, W. S.—Agents.

No. 622. Edinburgh and Leith Shipping Company, Pursuers.—*Moncreiff—Cockburn—L'Amy.* Downe, Bell & Mitchell, Defenders.—*Solicitor-General Hope—Boswell—J. J. Boswell.*

Jan. 29, 1824.

Second Division. Lord Pitmilly. M'K.

This was a question of accounting, in which the Lord Ordinary and the Court decerned against the defenders for the balance, reported by an accountant to be due.

Geo. Veitch, W. S.—J. Young,—Agents.

A. Barnes, Pursuer.—*Campbell.*
J. Hutchison, Defender.—*Brownlee.*

No. 623.

The Lord Ordinary found expenses due, subject to modification; and the Court adhered.

Jan. 31, 1824.

First Division.
Lord Alloway.
D.

W. Dallas, W. S.—P. Couper, W. S.—Agents.

Col. Erskine, Advocator.—*Solicitor-General Hope.*
J. Miller, Respondent.—*Handyside.*

No. 624.

The question here was, whether a road which passed through Miller's farm, was a parish road, which he was bound to leave open. The Sheriff of Aberdeen, on advising a proof, found that it was not. But the Lord Ordinary and the Court remitted with instructions to alter, and find that it was a parish road, which Miller was bound to make passable.

Jan. 31, 1824.

First Division.
Bill-Chamber.
Lord Eldin.
H.

J. B. Fraser,—Ker & Dickson, W. S.—Agents.

W. D. Proctor, Petitioner.—*More.*
J. F. Gordon, Respondent.—*Kinloch.*

No. 625.

Judicial Factor.—This was an application, at the instance of Proctor, judicial factor on the entailed estate of Carse, (the liferent of the proprietor of which had been adjudged by his creditors,) for authority to let leases for such period as was permitted by the entail of the estate. The Court refused the application, reserving to the factor to proceed according to the rules of law.

Jan. 31, 1824.

Second Division
M'K.

The Court considered that it was not their province to interpose their authority to the ordinary administration of judicial factors.

T. Deuchar,—J. F. Gordon, W. S.—Agents.

No. 626. A. Torry, Advocator.—*Dean of Faculty Cranstoun—Greenshields—Cay.*
Tailors of Edinburgh, Respondents.—*Shene—J. Henderson junior.*

Jan. 31, 1824.

Second Division
Lord Cringletie.
B.

Exclusive Privilege—Corporation—Reparation.—The Incorporation of Tailors of Edinburgh have the exclusive privilege of working within the ancient royalty of the city, in virtue of a seal of cause, which imposes certain penalties for each infringement of their rights. They raised action of interdict and damages, before the Magistrates of Edinburgh, against Torry, an unfreeman, for alleged encroachment on their privileges. The Magistrates allowed a proof, from which it appeared that Torry kept a shop within the burgh, in which he sold cloth and ready-made clothes,—that he employed as his foreman one Brown, a King's freeman, whom he brought to the shop to take the measure of his customers, and who then made the clothes in a workshop, also within burgh and rented by Torry. Brown paid the workmen under him, and he himself received wages from Torry, and also payment at a certain rate for the work done by him; but he did no work on his own account, and was solely the servant of Torry, by whom alone he was employed. On advising this

proof, the Magistrates interdicted Torry, and found him liable in damages. Torry brought an advocation, and contended, 1. That as he himself did not work, he was guilty of no infringement. 2. That the seal of cause having imposed penalties for infringement of their privileges, the incorporation could not insist for damages also. It was answered, 1. That the employment of Brown was an illegal attempt to evade the law. 2. That they were entitled to reparation at common law, for an invasion of their legal rights. The Lord Ordinary advocated the cause, and assoilzied Torry; but the Court altered and remitted simpliciter.

The Court considered the difference of this case from that of Forrester, to be, that there, the unfreeman had employed a freeman who worked for the public on his own account, while in this case Torry had worked by his own hired servant.

Advocator's Authorities.—(1.)—Wrights of Glasgow, March 8, 1765, (1961); Goldsmiths of Edinburgh, March 2, 1802, (Ap. Royal Burgh, 10.); Tailors of Glasgow, Jan. 26, 1808, (F. C.); Caggan, Jan. 14, 1823, (ante, Vol. II. No. 109.)—(2.)—Burgh of Kirkwall, July 16, 1755, (1943); Midwinter, &c. June 7, 1748, (8295); Hinton, July 28, 1775, (8307); Payne and Cadell, July 17, 1787, (8310); Cadell and Davies, Dec. 18, 1804, (F. C.).

Respondent's Authorities.—(1.)—Hammermen of Glasgow, Feb. 18, 1757, (1960); Cordiners of Glasgow, Dec. 5, 1756, (1948).—(2.)—Mary's Chapel, Jan. 14, 1747, (1955).

J. M'ANDREW,—J. JOHNSTON jun.—Agents.

No. 627.

D. STEWART, Pursuer.—*Monteith.*
D. KENNEDY, Defender.—*Menzies.*

Jan. 31, 1824.

SECOND DIVISION
F.

Cessio Bonorum.—Decreet of cessio refused in hoc statu, on the ground that the pursuer, after having lodged the title-deeds of a small heritable property with the agent of one of his creditors, in security of his debt, and for the purpose of negociating a loan for payment of it, obtained them from him under a false pretence, and a promise to return them, and granted an heritable bond over it to a third party for an immediate advance of money, which he applied to his own use.

J. HAMILTON, W. S.—J. KENNEDY, W. S.—Agents.

No. 628.

MRS ANDERSON, Pursuer.—*Buchanan.*
ABERCROMBIE'S TRUSTEES, and Others, Defenders.
—*Graham Bell.*

Jan. 31, 1824.

SECOND DIVISION
Lords Pitmilly and Mackenzie.
M'K.

Marriage-Contract—Minority and Lesion.—By an antenuptial contract Mrs Anderson, a minor, with consent of her deceased father's Trustees, disponed all her property to herself and Anderson 'her intended husband, in conjunct fee and 'liferent, for their respective lives allenarly, and 'to the children of the marriage in fee;' and, on the other hand, Anderson conveyed to her in liferent, and the children of the marriage in fee, all property which he possessed, or might acquire during the marriage. Anderson was insolvent at the date of the marriage; and a few years there-

after the liferent of his wife's property was conveyed to trustees for behoof of his creditors. On attaining majority, Mrs Anderson raised action of reduction of the contract, on the ground of minority and lesion, calling her husband, her children, and her father's trustees; and she contended, that she had suffered lesion by divesting herself of the fee of her property, and not excluding the jus mariti as to the rents; that the provisions in her favour were completely nugatory, in consequence of the insolvency of her husband at the period of the marriage; and that she was, at least, entitled to have the contract modified, so as to afford her a reasonable provision. The Lord Ordinary assoilzied the defenders, and the Court refused a reclaiming petition, without answers.

It was observed by Lord Glenlee, that, in the cases quoted by the pursuer, more had been given to the husband by the marriage-contract than he would have had at common law, which was not the case here.

Pursuer's Authorities.—1. Bankt. 181; 1. Stair, 644; 1. Ersk. 7, 58; Gordon, Feb. 26, 1669, (8992); Carmichael, Feb. 14, 1698, (8993); Byres, July 28, 1708, (8995); Lyon's Creditors, Dec. 14, 1714, (6060).

R. Burnett, W. S.—R. Fleming,—H. Sibbald, W. S.—Agents.

No. 629. CONNEL, WRIGHT & COMPANY, and MANDATARY, Pursuers.—*Brown.*
SIR W. C. FAIRLIE and Others, Defenders.—

Jan. 31, 1824.
SECOND DIVISION. Lord Cringletie. F.

Process.—Citation.—In an action of forthcoming, decree in absence having gone out against Sir W. C. Fairlie, the common debtor, he was reponed on a full representation, and allowed to give in defences. He thereupon lodged dilatory defences, of which the principal was, that the service copy of the summons did not contain the names of the witnesses present at the execution, as required by the acts 1686, c. 4, and 1693, c. 19. The Lord Ordinary reported the case on minutes of debate; and no minute having been lodged for Sir W. C. Fairlie, the Court, in respect of no opposition, repelled the preliminary defences.

Pursuer's Authorities.—4. Bankt. 6, 9; Erak. iii. 5, 55; iv. 1, 47; Macdonald, Jan. 11, 1726, (3765); Colt v. Cuningham, (9495); Macpherson v. Macpherson, 1820, (not rep.); Dunlop v. Spreul, (not rep.); Beattie, Feb. 14, 1823, (ante, Vol. II. No. 1951).

J. CRAUFORD, W. S.—J. GEMMEL,—Agents.

No. 630. SUSAN MACINTYRE, Pursuer,—*Cockburn—Shaw Stewart.*
J. MASTERTON, Defender.—*Fullerton.*

Feb. 3, 1824.
FIRST DIVISION. Lord Alloway. S.

Real or Personal.—The late Donald Macintyre executed a disposition and deed of settlement in favour of his grandson David, of which the dispositive clause was in these terms: "I do hereby,

'with and under the burdens, conditions and reservations after expressed, give, grant, and dispone, to and in favours of the said David Macintyre, his heirs and assignees whomsoever, heritably and irredeemably, all and whole,' &c. But 'with and under the burden of the payment of 'all my just and lawful debts, deathbed charges, 'and funeral expenses; and also with and under 'the burden of the payment of the sums of money following to the persons after named.' After allotting £100 to one individual, the clause proceeded, 'and to Susan Macintyre, my second daughter, wife of John Macintyre at 'Craigduninish, parish of Ardchattan, the like sum 'of £100 Sterling,' to be paid at a certain period. The obligation to infeft was in these words: 'In which lands, and others above disponed, with and under the burdens, conditions, 'and declarations foresaid, I bind and oblige 'myself, and my foresaids, to infeft and sease 'the said David Macintyre and his foresaids.' The procuratory of resignation was qualified in the same way, and the precept of sasine was 'with and under the burdens, provisions and 'conditions foresaid, and which are hereby ex'pressly appointed to be engrossed in the infeftments to follow hereon.' Sasine was accordingly taken in these terms. David Macintyre sold the lands to Mr Masterton, and granted a disposition, in which all the legacies, with the exception of that in favour of Susan, were mentioned, and were stated to have been declared, by the disposition by his father, 'a burden upon the lands.'

David having become insolvent, Susan brought an action against Mr Masterton, for payment of the sum of £.100 provided to her, which, she contended, was a real burden on the lands. In defence he pleaded, that it was a burden not upon the lands, but upon David Macintyre; and that, at all events, as it was not unequivocally constituted a burden upon the property, a singular successor could not be affected by it. The Lord Ordinary assoilzied him, 'in respect of the decision Martin v. Paterson, 22d June 1808, which 'is similar to the present case; and in respect that 'although the lands in question are conveyed to 'David Macintyre, under the burden of the payment of the granter's just and lawful debts, and 'also under the burden of the payment of the 'sums of money therein mentioned, and now 'claimed by the pursuer, yet the same are not 'distinctly and expressly declared a real burden 'on the lands.' The Court, by a majority, adhered, on the grounds stated by the Lord Ordinary.

Pursuer's Authorities.—2. Ersk. 3, 49; 1. Bank. 653; Ballantine, Nov. 18, 1685, (10240); 1. Bell, 584; Cred. of Smith, Jan. 10, 1738, (10246.).

Defender's Authority.—Rob. Ap. Cas. 379; Martin, June 22, 1808, (Ap. No. 5. Per. and Real.).

W. Patrick, W. S.—Dallas & Innes, W. S.—Agents.

LADY M. L. CRAWFURD, Pursuer.—*Alison.* No. 631.
J. DICKSON & Others, Defenders.—*Forsyth—Cockburn.*

Lease of Coal—Homologation—Jury-Court. — Feb. 3, 1824.

FIRST DIVISION. Lord Alloway. H.

The farm of Knightswood, belonging to the pursuer, adjoins the lands of Hillhead, Jordanhill and Scotstown, the property of other heritors, in all of which coal has been worked for a considerable period of time. In 1769, certain predecessors of the defenders, who were tacksmen of the adjoining coal fields, obtained a lease from the late Earl of Crawfurd of the coal of Knightswood, for thirty years. By that tack, he granted full power 'of 'working and winning all the coals within the 'boundaries of the said lands,' and of sinking pits, &c.; and it was specially conditioned, 'that 'if, after the expiry of the lease, or that the fore-'said main coal shall be wrought out and become 'not worth working, and that the fire engine and 'engines then in the premises shall be proper 'and useful for draining the water off from any 'neighbouring coals, of which the lessees, or any 'of them, shall at the time either be proprietor or 'lessee, then the said Earl hereby grants full li-'berty to the said lessees, and their foresaids, to 'continue the said engine or engines, and other 'machinery on his lands of Knightswood, and 'others aforesaid, and that while and so long as 'the said coal on the said neighbouring grounds 'shall continue to be wrought thereby: the said 'lessees always paying to the tenants of the said

'Earl any damage they may suffer or sustain 'thereby.' The lease also contained the usual clause as to working in a proper manner, and a power of inspection. The coal was wrought and exhausted during the currency of this lease; and in 1800 the Earl of Crawfurd granted to one of the tenants a lease of the surface of Knightswood, as a subject of agriculture, for nineteen years. During that period, an engine was employed for the purpose of draining off the water from the neighbouring coals, which continued to be worked by the successors of the original tacksmen. At the termination of the lease in 1819, the engine was removed, in consequence of which the water flooded the coal field of Knightswood. The pursuer thereupon brought an action against the defenders, alleging that their predecessors had, under the lease of 1769, illegally worked out the whole march coal between the coal of Knightswood and the conterminous coal fields; that they ought to have left a barrier, and that by not having done so her coal had been overflooded. She therefore concluded, that they ought to be ordained to remove the water, and to form a sufficient barrier, or otherwise to pay damages. In defence, it was stated, that prior to the date of the tack, the coal of Knightswood, including that of the adjoining estates, had been worked as one field, and communications made from the one to the other; that the coal was of such a porous nature, that it was impossible to work any part of it and at the same time to leave a sufficient barrier to prevent the water from flowing in; and it was contended,

1. That by the terms of the tack the tenants were entitled to work all the coal: 2. That Lord Crawfurd must be held to have consented that the water in the neighbouring coal fields should be allowed to communicate with the workings at Knightswood, by permitting an engine to be placed on Knightswood, for the purpose of draining it off: And, 3. That as he had reserved a power of inspection, and had lived till 1810, he must, at all events, be held to have homologated the proceedings of his tenants. The Lord Ordinary remitted to Mr Bald, engineer, to inspect and report. Having done so, and stated that it appeared that the coal of all the lands had, prior to the tack, been wrought in continuation as one and the same coal field; that a communication had then been formed, by which the water might flow into Knightswood, and that, from the porous nature of the coal, it was impossible to leave any effectual barrier, the Court, on the report of the Lord Ordinary, assoilzied the defenders. The pursuer then reclaimed, and maintained, that as this was an action of damages, she was entitled to a remit to the Jury-Court. But the Court, holding that the defences, in point of law, were well founded, that this was not a case which it was imperatively necessary to send to the Jury-Court, and that Bald's report was the best evidence which could exist, adhered.

Pursuer's Authorities.—Wemyss, Feb. 7, 1809, (F. C.); 3. Ersk. 2, 16; 59. Geo. III. c. 35, § 1-2.

Defenders' Authorities.—Williamson, Aug. 4, 1761, (10459); Aiton, May 19, 1801, (App. No. 6. Prop.); Kinnoul, Jan. 18, 1814, (F. C.).

G. Lyon, W. S.—D. Fisher,—Agents.

No. 632. J. & G. SPENCE, Petitioners.—*Dean of Faculty Cranstoun—Ivory.*
PHILP & LAW, Respondents.—*Murray—J. Wilson jun.*

FIRST DIVISON. Feb. 3, 1824. D.

Sequestration—Discharge—Merchants' Books.—The estates of J. & G. Spence were sequestrated under the bankrupt act in 1813; and at the distance of ten years they, without the concurrence of their trustee, but with the requisite consent of creditors, applied for a discharge. This was opposed by Philp & Law, on various grounds, but particularly, that either immediately prior to, or after the bankruptcy, they had destroyed one of a series of ledgers, and had mutilated two bill-books, by cutting out from one upwards of one hundred pages, and from another eighty-four pages. The fact was admitted; but it was stated, that it had not been done for any fraudulent or improper purpose; that these books were not necessary to present a state of their affairs, as this was sufficiently done by those which they had delivered to the trustee; and that a committee of the creditors had been appointed to inquire into the value of the estate, and had not complained of the loss. The Court, before answer, remitted to the trustee to give in a report, 'stating how far the 'mutilations of the bill-books, and the non-exis-'tence of the ledger, prevented him from ascer-'taining the real state of the affairs of the com-'panies in question, and the partners thereof; 'and whether any fraud or concealment had, or

'might have been practised by them at and pri-
'or to the period of the bankruptcy; and, ge-
'nerally, stating to the Court the whole reasons
'inducing him not to concur with the petitioners
'in the applications for their discharge.' He reported, that he had not been prevented, so far as he had been able to discover, from ascertaining the real state of the affairs of the Company; that the whole books in existence had been submitted to a committee of creditors, well qualified to judge of their accuracy and completeness; that they did not experience any obstacle, from the want of the books in question, in ascertaining the value of the estate; that he could not say whether any fraud might have actually been practised; but that although he had no reason to suppose that there had been any, yet he had been alone induced to refuse his concurrence by the destruction and mutilation of these books. The Court at first refused the discharge; but thereafter, and all opposition being withdrawn, they granted it.

All of the Judges concurred in holding that the objection was one of very great importance; and although two of them were much influenced by the report of the trustee, yet they agreed with the others, that the destruction or mutilation by a merchant of any of his books was, in any circumstances, highly illegal. They were, however, of opinion, that there was evidence that no fraud had been intended or accomplished, and were for granting the discharge. But the other three Judges held, that it was impossible to discover whether or not any fraud had been committed; that an act such as this afforded at least a presumption

against the bankrupts, and the best means of concealment; and that it was essential, for the protection of the public, that it should be effectually checked.

Respondents' Authorities.—2. Bell, 466; Macintyre, July 3, 1821, (ante, Vol. I. No. 123.); Oddy, July 3, 1821, (ante, Vol. I. No. 124.).

FORSYTH & MACDOUGALL,—A. PEARSON, W. S.—P. PEARSON, —Agents.

No. 633. G. LANG, Suspender.—*Brownlee.*
MARY LAMONT, Charger.—*Jameson.*

Feb. 3, 1824.

SECOND DIVISION Bill-Chamber. Lord Eldin. M'K.

Process—Bill-Chamber—A. S. 14th June 1799.—Laing presented a bill of suspension of a decree of the Sheriff, which was refused by the Lord Ordinary on the 24th December 1823. He obtained a sist for the usual period, to enable him to reclaim; but his petition, though marked by the Keeper of the fee-fund on the 7th of January, was not marked by the Clerk of Court till the 28th, nor boxed till the 29th. The Court refused it as incompetent, under the A. S. 14th June 1799.

G. LAING,— ——— —Agents.

No. 634. MRS E. HOUSTON and Others, Pursuers.—*Fullerton—Cockburn.*
W. STIRLING and Others, Defenders.—*Dean of Faculty Cranstoun—Skene.*

Feb. 3. 1824.

SECOND DIVISION Lord Reston. F.

Arrestment jurisdictionis fundandæ causa—Process—Admiralty and Commissary Courts.—The late Mr Houston, merchant in London, nomina-

ted as his executors, Mrs Houston and others, all resident in England, who, having obtained letters of administration from the Prerogative Court of Canterbury, entered into possession of a great part of the deceased's effects, and inter alia of a bill for L. 500, in which Allan, Scott, and Son, merchants in Glasgow, were obligants. For the amount of this bill, and other large sums due by Allan, Scott, and Son, to the late Mr Houston, the executors lodged a claim with Mr Bannatyne, trustee on their sequestrated estate. Thereafter Stirling and others, creditors of the deceased, having obtained letters of arrestment in the Court of Admiralty jurisdictionis fundandæ causa, arrested these funds in the hands of Mr Bannatyne, as 'addebted by him to the said Elizabeth Hous-' ton,' &c. the executors, and thereon raised summons against them in the Admiralty Court, concluding for payment of the debts alleged to have been due them by the deceased, and again arrested on the dependence. This summons was executed against the pursuers edictally, and decreet in absence obtained and extracted. Stirling, &c. produced this decreet as their ground of debt, and took out an edict in the Commissary Court, directed generally against the 'executors-testamen-' tors, &c. of umquhil J. H. Houston,' and were decerned executors-creditors of the deceased.

An action was then raised by the executors under the English will, to have these decreets reduced, on the following grounds: 1. That the arrestments jurisdictionis fundandæ causa were inept, as the foundation of an action against them,

having been used in Mr Bannatyne's hands, on funds as due to the executors, which were in fact still in hæreditate jacente of the deceased, the executors not having been vested with these funds by confirmation; 2. That it was incompetent to cite the executors edictally, on a warrant from the Court of Admiralty, in an action regarding questions in which it is only an inferior court, that mode of citing foreigners being competent to the Court of Session only, as a commune forum; and, 3. That as they, in the character of executors, and in virtue of the probate of the English will, had a right to property in Scotland vested in them similar to that which an executor qua nearest of kin in this country had to funds not confirmed, the defenders ought to have directed the edict taken out of the Commissary Court specially against them, in the same way as they must have cited the principal executor in Scotland, in obtaining themselves decerned executors-creditors, quoad omissa vel male appreciata; and that, by not having done so, their decreet was inept. The Lord Ordinary repelled 'the objections to the 'regularity of the procedure before the Admiral-'ty and Commissary Courts,' and assoilzied the defenders; but the Court sustained the reasons of reduction founded on the objection to the arrestments, and reduced in terms of the libel.

The Court unanimously held, that the mode of proceeding against the funds of a deceased debtor, whose executors are foreigners, is to arrest jurisdictionis fundandæ causa, and then to raise an action concluding for decree cognitionis causa merely. 'The

difference, it was observed, between this case and that of Mackrill, was, that, in the latter, the libel was so restricted; and their Lordships refused to allow a restriction proposed by the defenders, because the decree was extracted, which rendered it incompetent. They also held edictal citations in the Court of Admiralty to be completely established by a long course of usage.

Pursuers' Authorities.—(1.)—1695, c. 41; 3. Ersk. 9, 35.—(2.)—3. Ersk. 2, 18; Kames's Law Tr. 269.—(3.)—Clerk, Dec. 20, 1759, (4471); Wardlaw, Jan. 21, 1715, (4500); Fraser, Feb. 10, 1784, (3921); Alison, May 26, 1802, (3922); 1695, c. 41; 2. Bankt. 398; 3. Ersk. 9, 36-7; 3. Stair, 8, 62; Duff, March 12, 1631, (2188); Baird, Feb. 14, 1622, (2187); Lees, Dec. 10, 1707, (3831.)

Defenders' Authorities.—(1.)—Ashton, Hodgson & Co. v. Mackrill, June 17, 1773, (4835.)—(2.)—1. Ersk. 3, 34; 1. Bell, 404.—(3.)—3. Stair, 8, 62; White, June 28, 1625, (2187.)

JAS. SMITH, W. S.—M'MILLAN & GRANT, W. S.—Agents.

No. 635.

REV. G. GORDON, Advocator.—*Dean of Faculty Cranstoun—Bell—H. Bruce.*

A. CHEYNE, J. SANDERS' Trustee, Respondent.—*Moncreiff—Skene.*

Feb. 5, 1824.

FIRST DIVISION. Lord Meadowbank. H.

Trust—Latent Equity.—In 1805, J. Sanders purchased one share of the capital stock of the Aberdeen Shipping Company in his own name, but truly for the late A. Gordon, to whom he granted this letter: 'The share of the Aberdeen Shipping 'Company, which stands transferred in my name 'in the books of the Company, was purchased 'by me with your money, and for your account; 'and I hereby acknowledge that the same is your

'property, and oblige myself to sell and transfer 'to any person you may desire, at any time here-'after, and to account to you for the whole pro-'fits which I shall hereafter draw for the said 'share.' This Company was afterwards united with another of the same name; and by a regulation, each original share was converted into two. Sanders thus held in this new Company two shares under the above arrangement with Gordon. The name of Sanders alone appeared in the books of the Company, and he regularly drew the profits corresponding to these two shares, for which he accounted to Gordon, and made entries in his own books accordingly. Gordon having died, leaving an infant child, the Rev. G. Gordon obtained himself served executor-dative, and allowed the shares to be held by Sanders as formerly. At the distance of fourteen years from the date of the letter, Sanders became bankrupt, his estate was sequestrated, and Cheyne appointed trustee. On this event, the two shares were claimed, on the one hand, by the Rev. G. Gordon, in virtue of the above letter; while, on the other hand, Cheyne insisted that they belonged to him, as judicial and general assignee of Sanders. In a multiplepoinding, the Sheriff of Aberdeen preferred Cheyne; but in an advocation, the Lord Ordinary preferred Gordon, 'in respect of the letter of declara-'tor of trust, and of the decision pronounced 'by the Court in the case of Maccombie and 'others against Dingwall;' and he observed in a note, that he 'certainly conceives that the deci-'sion in Maccombie's case trenches upon that

'pronounced in the case of Redfearn. But as 'that case was brought fully under the view of 'the Court in the pleadings in the case of Mac-'combie, he considers himself bound to decide 'this question according to the principle of that 'decision.' Cheyne having reclaimed, the Court, after being equally divided, ordered a hearing in presence. In support of his claim, Cheyne maintained, that as the House of Lords had decided, in the case of Redfearn, that a latent equity could not prevail against an onerous assignee, and as he, in virtue of the assignation contained in the act of sequestration, was, as the representative of the creditors, an onerous assignee, he was entitled to be preferred. On the other hand, Gordon contended, that the case of Redfearn related to the purchase of a special subject; that the decision had been pronounced on principles of equity and expediency, creating a new exception to the general rules of law, nemo plus potest in alium transferre quam ipse habet, and assignatus utitur jure auctoris; that as Sanders could not plead, in opposition to his letter of trust, that he had an absolute right in the shares, and as the sequestration could not alter the nature of the right, so Cheyne, who was not a special assignee, could have no better claim than the bankrupt himself. The Court, 'in respect the petitioner (Cheyne) is trustee for 'general creditors, who are neither purchasers 'nor special assignees,' adhered to the Lord Ordinary's interlocutor preferring Gordon.

All the Judges were of opinion, that the case of Maccombie, on which the Lord Ordinary rested his in-

terlocutor, was inapplicable, and did not affect that of Redfearn; that the general rules of law, founded on by Gordon, embraced purchasers and special assignees, prior to the case of Redfearn; but that, on proper views of equity and expediency, the House of Lords had found that they could not be subject to latent equities; and, (with the exception of Lord Gillies,) they held that the principles of that decision could not apply to the case of a general body of creditors under a sequestration, who took the rights of the bankrupt tantum et tale as they stood in his person.

Advocators' Authorities.—1. St. 10, 16; 1. Bell, 44, 229; M'Kenzie, Feb. 5, 1678, (10188); Street, June 9, 1669, (15122); Monteith, Nov. 8, 1710, (10291); 1. Bell, 190, 226; Dingwall, June 6, 1822, (ante, Vol. I. No. 515); 3. Ersk. 6, 16; 1. Cooke, 584, (Roote's Ed.); 2. Bank. 387; Chion 3. P. Williams, 187, Note; 1. Bell, 197; 1. Cooke, 593.

Respondent's Authorities.—1. Bell, 185, 224; Somervilles v. Redfearn; 1. Dow, 50; Elch. on St. 72.

H. J. Dickson, W. S.—R. Burnett, W. S.—*Agents.*

No. 636.

J. Dennistoun, Pursuer.—*Gillies.*
Mrs Crichton and Others, Defenders.—*Keay.*

Feb. 5, 1824.

First Division. Lord Meadowbank.

S.

Service. — Mrs Beveridge, the proprietrix of Fourmerkland, disponed it, in 1757, to herself and husband in liferent, for their liferent use allenarly, and to Andrew Beveridge in fee; whom failing, Robert Beveridge; whom failing, Jean Beveridge, their children. Andrew predeceased his parents, but Robert survived them, and, without making up titles, took possession. Having died without issue, Jean Beveridge served herself heir of provision in general to Mrs Beveridge the

liferentrix, and infeft herself in virtue of the procuratory contained in the deed 1757. After having married, she disponed the property to herself and her husband, Mr Macmillan, in liferent, and to their daughters seriatim in fee, on which deed infeftment passed. After her death in 1814, it was discovered that her titles were inept, by having served not to the fiar but to the liferentrix, and that therefore her daughters had right as heirs-portioners. One of them was the mother of Dennistoun; and he, in order to take up the property as an heir-portioner, brought a reduction for setting aside the erroneous titles, and for repetition of the rents since the death of Jean Beveridge in 1814. To this it was objected, that the decree must be qualified by a declaration, that he was liable for the debts both of Jean Beveridge and of her brother, who, it was alleged, had possessed on apparency. On report of the Lord Ordinary, the Court decerned in the reduction, and remitted quoad ultra.

R. WELSH,—W. GRIERSON, W. S.—Agents.

J. BALFOUR and J. PITCAIRN, Pursuers.—*Matheson—L'Amy—J. Wilson jun.*
R. CAMERON, Defender.—*Buchanan.*

No. 637.

Feb. 5, 1824.

SECOND DIVISION
Lord Bannatyne.
M'K.

This was an action of count and reckoning between the partners of a manufacturing company, in which the Lord Ordinary and the Court decerned against Cameron for the balance reported by an accountant to be due.

G. VEITCH, W. S.—R. FLEMING, W. S.—Agents.

No. 638. Miss Anne Binning, Pursuer.—*Greenshields.*
A. Blane, Defender.—*Jameson.*

Feb. 5, 1824.

Second Division
Lord Pitmilly.
B.

Title to pursue.—The late Patrick Binning, by a testamentary deed, conveyed his whole property, including the lands of Machrimore, to his wife and Blane as trustee, and bound them inter alia to pay to his sister Anne Binning, £. 500, in the event of his son's dying before he attained the age of twenty-five years. He left two daughters, Janet and Elizabeth, and one son, John. The latter, on his father's death, raised action of reduction of the trust-deed ex capite lecti, but without calling the pursuer as a party. In this action he of consent obtained decreet, and shortly afterwards died, at the age of twenty-two. His sisters, as his heirs-portioners, thereafter sold the lands of Machrimore to Blane, who, as part of the consideration, bound himself to free them of all debts chargeable against their deceased brother or his estate. Anne Binning having raised action against Blane for payment of the £. 500 provided to her by the trust-deed, the Lord Ordinary, in reference to the pleas of the parties, pronounced a special interlocutor, finding, 1. That the obligation granted by Blane was not to the pursuer, and therefore she could not found on it; and, 2. That as the trust-deed of Patrick was reduced, she must constitute her debt against Janet and Elizabeth, who had succeeded to the property as heirs-at-law of their brother John, leaving to them to operate their relief under the agree-

ment with Blane. He therefore sustained the defences in hoc statu, and assoilzied Blane; and the Court adhered.

A. Crawfuird, W. S.—Donaldson & Ramsay, W. S.—Agents.

R. Hill, Pursuer.—*Maidment.*
J. Mackay jun. and the Trustees of the late J. Mackay, Defenders.—*Jameson.*

No. 639.

Feb. 5, 1824.

Second Division
Lords M'Kenzie and Eldin.
F.

Superior and Vassal—Non-entry.—The late John Mackay having disponed to trustees his lands of Temple-Ballat, Hill the superior, on his death, brought a declarator of non-entry against the Trustees. John Mackay junior, the son and heir-at-law, having been also called, immediately offered to take an entry. Hill, however, insisted, that the Trustees should enter as singular successors; and contended, That he was not bound to enter an heir, while the true right to the lands was vested in third parties, nor without the production of his retour of service, as heir to his father. Lord M'Kenzie found that Mackay had right to an entry, and that the Trustees were not hoc statu bound to enter. On a representation by Hill, Lord Eldin adhered; and further, 'in 'respect that the defender John Mackay junior 'has all along offered to accept of an entry,' assoilzied all the defenders from the conclusions of the libel. Hill reclaimed, and pleaded, that at all events the lands could not be considered as not in non-entry, while no vassal was infeft. The

Court refused his petition without answers, the defender Mackay agreeing to take infeftment before extract.

It was observed on the Bench, that when the superior calls the heir, as such, in a declarator of non-entry, he cannot refuse to acknowledge him, though he be not served. The Court, however, considered the absolvitor before infeftment to be premature.

J. J. Fraser, W. S.—Donaldson & Ramsay, W. S.—Agents.

No. 640.

W. Macdowall and C. Selkrig, (Assignees of G. Crawford.)—*Marshall.*
J. Russell, (G. Crawford's Trustee.)—*Jeffrey—Monteith.*

Feb. 6, 1824.

First Division. Lord Meadowbank. H.

Trust—Real or Personal—Jus Crediti.—The late John Crawford was proprietor, inter alia, of a tenement of houses in Glasgow, and in 1788 he executed a general trust-settlement mortis causa, conveying his whole property to trustees for family purposes. In particular, he appointed that his widow should have the liferent of the houses and household furniture; but on her death, he directed 'the said tenement of houses, &c. to go to, and be 'the absolute property of the said George Crawford, my eldest son, and the child or children lawfully to be begotten of his body; whom failing, to his other sons nominatim; and declaring, that 'my said trustees shall be bound to denude themselves of the said tenement of houses in Glas'gow, &c. in favour of my said sons, in their or-

'der respectively, to be at their absolute dis-
'posal, and for that purpose to execute all neces-
'sary dispositions or other conveyances.' These conveyances were to be made to George Crawford, in case of the predecease of the widow, and on his arriving at eighteen years of age. In 1793 Mr Crawford died, and in order to complete the title of the trustees to the houses, which had been erroneously described, George made up titles as heir of his father, and conveyed them to the trustees, in conformity to the trust-deed, and the trustees were then infeft. George having contracted a debt to Macdowall and Selkrig, granted to them respectively, in 1797 and 1800, assignations in 'security of my share in these parts of the said 'trust-funds which are liferented by my said 'mother, and also the tenement of land or houses 'in George Square in Glasgow,'—with power to 'bring the trustees to account, and to demand 'and receive from them a valid and sufficient con-'veyance of the said tenements of lands and hou-'ses.' These deeds were duly intimated to the trustees. In 1811, the estates of George Crawford were sequestrated under the bankrupt statute, and in 1818 the widow predeceased him. Russell then, as trustee of the creditors, obtained a special adjudication, on which he made up titles to the houses in Glasgow. A preference having been claimed by Macdowall and Selkrig as assignees, the private trustees brought a multiplepoinding, in which the question arose, whether the intimated assignations were sufficient to divest George Crawford of the beneficial interest which he had under the trust,

deed in the houses. Macdowall and Selkrig contended, that he had no real or feudal right; that he had merely a jus crediti or title to demand from the trustees a conveyance in his favour; and that this being a personal right, could only be effectually transferred by an intimated assignation. On the other hand, Russell contended, that wherever trustees are infeft in heritable subjects for behoof of a particular individual nominatim, the right of the latter is real, and cannot be conveyed by a personal deed; and that therefore he, in virtue of his feudal title, was preferable. The Court, on the report of the Lord Ordinary, preferred Macdowall and Selkrig, ordained the trustees to denude in their favour, and thereafter refused a petition without answers.

It was observed from the Chair, that there was a material distinction between this case and that where a party having the beneficial interest in the trust was the granter and the original proprietor; that the trust was in that case merely a burden on his right: but that where there was no original title, and the right arose from the trust-deed alone, there was only a jus crediti. In this opinion the rest of the Judges concurred, and held the case of Gordon's Trustees a precedent in point.

Assignees' Authorities.—Wallace, Feb. 13, 1665, (12857); Cuming, Dec. 7, 1697, (12881); Gibson, Feb. 4, 1726, (12885); Campbell, Feb. 3, 1732, (Ib.); Finlayson, Dec. 9, 1765, (12874); Christie, Jan. 21, 1806; (Ap. No. 5, Pro. to Heirs); Gordon's Trustees, Dec. 4, 1821; (ante, Vol. I, No. 221.)

Trustees' Authorities. — 1. Ersk. 2, 22; 2. Craig, D. 1, § 4; Dirleton, (Trustees in Infeft.) Donaldson, March 11, 1786, (6242); Spiers, Dec. 14, 1790, (8808); Durie, Nov. 30, 1791, (4624); Balcarres's Creditors, Jan. 14, 1801, (Ap. Adj. No. 11); 2. Bell, 32.

Tod & Romanes, W. S.—G. Napier,—Agents.

J. P. STORRIE and Others, Petitioners.—*Neaves.* No. 641.
J. WATSON, Respondent.—*Monteath.*

Sequestration—Interim Factor—Personal Protection.—Watson, interim factor on the sequestrated estate of Cochrane, applied for, and obtained a personal protection to the bankrupt. After its expiration, and during a competition for the trusteeship, and after he had been certiorated, at a meeting of the creditors, that a renewal would not be agreed to, he presented an application to the Lord Ordinary on the Bills to that effect. This having been opposed by Storrie and others, creditors, and replies and duplies having been lodged, the Lord Ordinary refused the protection, and found, that the expense of the replies was not to be charged against the general fund. Having said nothing as to the expenses of Storrie and others, they applied to the Court, who found Watson personally liable for them.

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Lord Glenlee.
S.

C. NAIRNE, W. S.—J. HAMILTON, W. S.—Agents.

J. MARSHALL, Suspender.—*Ro. Bell.* No. 642.
G. SANDERS, (AMORY's Trustee,) Charger.—*More.*

Bankrupt — Heritable Creditor. — Sanders, as trustee on the sequestrated estate of Amory, exposed to sale the heritable property, over which Marshall and Cuthill held an heritable bond, with a power of sale, for £.500. By the articles of roup, the purchaser was bound to pay the price at Whitsunday 1822. Marshall bought

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Lord Eldin.
H.

the property for £. 500; and having been charged to pay it, he presented a bill of suspension, stating, that he was entitled to retain the price, in compensation of the heritable debt due to him; that a contingency existed with an action in Court; and that the charge was irregular. To this it was answered, that he was bound to pay in terms of the articles of roup; that there was a preferable right of hypothec over the title-deeds, to the extent of £. 900; and that he was liable for the expenses of the sale. The Lord Ordinary refused the bill, but the Court passed it.

W. Bell, W. S.—H. Graham, W. S.—Agents.

No. 643.

C. S. Middleton, Complainer.—*More.*
G. Sanders, Wilson's Trustee, Respondent.—
D. Macfarlane—Maitland.

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First Division. S.

Sequestration—Trustee.—Middleton presented a complaint, stating, that he had obtained decree before the Magistrates of Glasgow against Wilson, on whose sequestrated estate Sanders was trustee, for £. 216; that he had lodged a claim, which had been received without objection; that the bankrupt had offered a composition, as to the acceptance of which a meeting was to be held on the 6th September 1823; that it being known to Sanders that the complainer meant to oppose it, and that his vote was sufficient to do so, he, along with the agent in the sequestration, (who had been the opposite agent in the action,) and two of the commissioners, had reviewed the judgment of the

Magistrates on the 5th of September, and had rejected his claim, with the exception of £. 5, 5s. Sanders attempted to justify his decision on various grounds; but the Court ordained him to rank the complainer, and found him personally liable in expenses.

D. Scalia,—W. Guthrie,—Agents.

J. Innes, Suspender.—*Forsyth—Skene.* No. 644.
Union Canal Company, Chargers.—*Cockburn—Cay.*

Feb. 7, 1824.

Second Division
Bill-Chamber.
Lord Eldin.
M'K.

Mutual Contract.—The Union Canal Company agreed with Innes to excamb a part of their property for an equal quantity of a field belonging to him, for the purpose of building stables for the Canal Company, which Innes stipulated should be erected at a particular spot. Before the ground to be received by them was measured off, the Company having begun to build the stables on a different part of the field, Innes presented a bill of suspension and interdict, which was passed by the Lord Ordinary, and the Court adhered.

P. Crooke, W. S.—J. S. Davidson, W. S.—Agents.

No. 645. J. JOHNSTONE, Suspender.—*Forsyth.*
J. and G. CLEGHORN, Chargers.—*Macdonald.*

Feb. 7, 1824.
SECOND DIVISION
Bill-Chamber.
Lord Eldin.
B.

Landlord and Tenant.—Johnstone presented a bill of suspension of a warrant to sell the goods in his shop, obtained by Cleghorns, his landlords, for payment of arrears of rent, on the ground that he had counter claims against them for alleged repairs. It appearing, however, that by his lease he had agreed to accept a deduction of £. 10 annually in full of all repairs, and that this sum had been allowed him, the Lord Ordinary refused the bill, and the Court adhered.

T. BAILLIE,—D. WATSON,—Agents.

No. 646. J. JACKSON and Others, (Church-wardens of the Parish of Stanwix,) Pursuers.—*Skene—A. Connell.*
W. and F. CARRUTHERS, Defenders.—*Rob. Bell.*

Feb. 7, 1824.
SECOND DIVISION
Lord Reston.
M'K.

Aliment.—This was an action by the parish of Stanwix in Cumberland, for the aliment of a bastard child, founded upon a recognisance entered into in England by William and Francis Carruthers, and an order in bastardy following thereon. The question depended entirely on the effect which, by the law of England, was due to the recognisance and order; and the Court, on the opinion of English counsel, assoilzied the defenders.

T. JOHNSTONE,—JOHNSTONE & LITTLE,—Agents.

J. CHRISTIE, Advocator.—*Greenshields.* No. 647.
C. S. GARDNER, Respondent.—*M'Neill.*

Feb. 10. 1824.

FIRST DIVISION. Lord Meadowbank.

The sole question here was, Whether the advocator had departed from his right to claim expenses in an action which, on the merits, had been vacated. The Magistrates of Glasgow and the Lord Ordinary found, that, in consequence of certain letters, he must be held to have waved them. But the Court altered, and found that he had not.

T. KERR, W. S.—TOD & WRIGHT, W. S.—Agents.

J. and A. WALKER, Pursuers.—*More.* No. 648.
J. STEEL, Defender.—*Cockburn.*

Feb. 10, 1824.

SECOND DIVISION B.

Process—Jury Court.—On the 13th of January last, Steel, the defender, obtained a verdict in his favour before the Jury Court. The pursuers, with a view to a motion for a new trial, boxed copies of the verdict and issues, within twenty days from the date of the verdict, but they were not marked by the Clerk of Court, and the application was now made for the first time. The Court refused the motion as incompetent, in respect it was more than twenty days from the date of the verdict.

A. SMITH, W. S.—RUSSELL, ANDERSON & TOD, W. S.—Agents.

No. 649. J. V. AGNEW, Petitioner.—*Solicitor-General Hope—D. Dickson.*

J. KERMACK, W. S., Respondent.—*Baird.*

Feb. 10, 1824. SECOND DIVISION M'K.

Process—Summary Application.—On the 3d June 1818, the Court, in an action at the instance of Mr Agnew against the Earl of Stair and others, assoilzied them, decerned for expenses, and allowed decree to go out in the name of Kermack, W. S. their agent. The decision of the Court having been reversed on appeal, and the judgment of the House of Peers applied, the case was remitted to the Lord Ordinary, as mentioned, ante, Vol. II. Nos. 63. & 300. During the dependence of the case before the Lord Ordinary, Mr Agnew presented a petition, praying the Court to ordain Kermack instantly to repeat the expenses formerly received by him. The Court refused the petition as irregular, reserving to Mr Agnew to make any competent application to the Lord Ordinary.

J. B. GRACIE, W.S.—J. KERMACK, W. S.—*Agents.*

No. 650. POLLOCK'S REPRESENTATIVES, Pursuers.—*Murray—Blackwell.*

D. C. BUCHANAN, Defender.—*Greenshields—Skene.*

Feb. 10, 1824. SECOND DIVISION Lord Cringletie. M'K.

Interim Decreet—Expenses.—In an action of count and reckoning at the instance of the representatives of R. and A. Pollock against Buchanan, the accountant having given in an interim ac-

port, showing a balance of upwards of £. 32,000 in favour of the pursuers, the Lord Ordinary gave an interim decreet for £. 25,000, and he also found Buchanan liable in the expense of a discussion relative to the consignation of part of the sum. The Court adhered, with this condition, that the pursuers should loose arrestments (which they had used on all Buchanan's funds,) to the amount of the sum decerned for.

B. Cowan, W. S.—G. Dunlop, W. S.—Agents.

W. Jack, and His Majesty's Advocate, Complainers.—*Solicitor-General Hope—Jeffrey—Stena—Robertson—Ritchie.*

No. 651.

P. Pearson, Respondent.—*Dean of Faculty Cranstoun—Fullerton—Moncreiff—J. Henderson junior.*

Feb. 11. 1824.

First Division. H.

Messenger's Execution.—Pearson was employed, in 1815, as a law agent by Malcolm, to raise diligence on a bill, on which Jack, among others, was an obligant. Letters of horning were accordingly obtained, and a charge was given to Jack on the 14th of November 1815, of which, however, the messenger returned no execution. Some time thereafter Malcolm brought an action against Pearson for payment of the bill, on the ground of having failed to perform his duty. In the course of that action it was averred by Pearson, that a charge had been given to Jack, but, on an examination of the horning, it was found, that although Jack's name was in the body, yet it was

not in the will. After this discovery, Pearson, on the 24th June 1822, wrote to the messenger (for whom he was cautioner,) requesting that he would transmit an execution, and stating, 'there 'is no doubt you gave a charge to Jack; but as 'his name is not in the will of the horning, you 'seem to have stopt short with the execution. You 'will determine how far you are at liberty to send 'me a separate execution still. It may assist our 'argument on the point of expenses. It cannot 'hurt you; for I shall guarantee you against all 'injurious consequences.' The messenger complied with this request, but observed, that 'the 'execution against Jack can have no faith in 'judgment, as I had no warrant for executing it 'against him, he being kept out of the will.' Pearson produced this execution in the process, to shew, as he alleged, that in fact he had adopted steps against Jack; and Malcolm having threatened a complaint to the Court, he, to obviate this, paid the debt and expenses. Pearson then notified to Jack, that he meant to operate his relief against him. Jack having been informed of the circumstances relative to the execution, intimated to Pearson, that if he did not desist, and also comply with certain terms, he would present a complaint to the Court. Pearson having refused to do so, Jack, with concourse of the Lord Advocate, gave in a complaint to the Court, stating that Pearson had prevailed upon the messenger to fabricate and grant a false execution of a charge of horning against him, for the purpose of being founded on as evidence of the existence of a debt,

and praying to find that his conduct was unwarrantable and illegal, and to inflict such fine or punishment as might be proper. In defence, Pearson stated that the complaint was oppressive, and for the purpose of extortion; that he had procured the execution not with the view of following forth diligence against Jack, but to shew that the allegation of Malcolm, that no charge had been given, was unfounded. The Court sustained the complaint, found the conduct of Pearson to be unwarrantable and illegal, and decerned against him for expenses.

The Judges were of opinion, that although a party may obtain from a messenger who is possessed of proper materials, an execution of a charge actually given at a distant period, yet that in the circumstances Pearson was culpable in procuring and producing the one in question, the more especially as he had given a guarantee; and although two of the Judges considered that Jack was acting oppressively in presenting the complaint, yet they stated that they could not avoid concurring in the censure on Pearson.

T. Walker,—Ramsay & Imrie,—Agents.

W. Lang, Advocator.—*Brown.*
Mrs Railton, Respondent.—*Jardine.*

No. 652.

Feb. 11. 1824.

First Division.
Lord Meadowbank.
D.

Multiplepoinding. — Mrs Railton was infeft in certain houses in Glasgow, under a contract of marriage, in security of an annuity of £.30, payable after the decease of her husband. Lang was tenant of these houses from Whitsun-

day 1820 to Whitsunday 1821, during which period various arrestments were executed against him by the creditors of the husband. Thereafter, and before the term of Whitsunday 1821, the husband died; and when it arrived, Mrs Railton demanded payment of the rent, in virtue of her infeftment. Lang expressed his willingness to pay, provided the arrestments were removed; but this not being agreed to, he raised a multiplepoinding before the Magistrates on the 18th of May, and, on the same day, Mrs Railton instituted a process of sequestration before the Sheriff. The multiplepoinding was executed on the 22d of May, and Lang founded upon it in defence against the sequestration. A considerable deal of litigation occurred; but at last Mrs Railton having appeared in the multiplepoinding, the Magistrates preferred her, and found Lang entitled to his expenses. In the process of sequestration, however, the Sheriff decerned against him for expenses, on which he brought an advocation, maintaining that he was entitled to raise the multiplepoinding, and that as this was the only mode of settling the competing rights, Mrs Railton was not justified in applying for a sequestration. The Lord Ordinary repelled the reasons, 'in respect 'the process of sequestration, at the instance of 'the respondent, was served on the complainer 'four days prior to the service or execution of 'the multiplepoinding.' But the Court altered, and found Lang entitled to his expenses, both in this and in the Sheriff-court.

Advocator's Authorities.—Watson, Feb. 27, 1750, (9133); Campbell, May 29, 1821, (ante, Vol. I, No. 42).

W. & A. G. Ellis, W. S.—W. Ferguson, W. S.—Agents.

J. Fisher & Others, Suspenders.—*Forsyth—Moncreiff—More.*
J. Stewart, Charger.—*Dean of Faculty Cranstoun—Jameson.*

No. 653.

Feb. 11, 1824.

Second Division
Bill-Chamber.
Lord Pitmilly.

Cautioner — Summary Diligence. — Fisher and others granted a bond of caution to the Perth Union Bank, for the intromissions of Cameron and Bisset, agents for the Bank at Dunkeld, by which it was declared, 'that a stated account made 'out from the books of the said Bank, and certi- 'fied by the cashier or accountant of the Bank 'for the time being, shall be sufficient to consti- 'tute a balance and charge against us,' &c. The bond contained a clause of registration in the usual terms, but no authority to registrate the certified account. Cameron and Bisset having become bankrupt, Stewart, for the Bank, charged the cautioners for payment of £.12,858, as the balance due to the Bank. They presented a bill of suspension of this charge, and of a threatened charge for any further balance that might be brought out by a future certified account. The Lord Ordinary refused the bill, in respect of no caution. They then reclaimed, and contended, that they were entitled to have the bill passed without caution, on the ground, that as the bond contained no consent to registrate the account by

which the balance due was to be ascertained, and as the amount had not been liquidated by the decree of any Court, the diligence for payment of a sum certain was inept, and without a legal warrant; and as to the threatened charge, that the bond consented to diligence passing upon one account only, and not on any number of accounts which the bank officer might from time to time certify. To this it was answered, that the consent to hold the account as ascertaining the balance due, was of itself sufficient to establish the amount for which a charge should pass on the registered bond, and that it was unnecessary to discuss the merits of a second charge until it should actually be given. The Court (by a majority) adhered, 'reserving to the suspenders, 'if any other charge shall be given, to offer a sus-'pension of the same upon such terms as they 'shall be advised, and the chargers their answers.'

Suspenders' Authority.—Opinions of the Court in Forrester, June 27, 1815, (F. C.)
Charger's Authority.—1. Bell, 277.

A. Gifford,—J. & W. Murray, W. S.—Agents.

No. 654. J. M'Ewan, Advocator.—*Solicitor-General Hope —Blackwell.*
Davies, Beard & Davies, Respondents.—*Forsyth —Cockburn.*

Feb. 12, 1824.

First Division. Lord Meadowbank.

S.

Advocation—Jurisdiction.—The respondents, English merchants, sold goods, amounting to £. 46, 6s. to M'Ewan, on whom their commercial

agent, (after deducting discount,) drew a bill for £. 44, 14s., which he put into the hands of a banker. M'Ewan having objections to part of the goods, declined to accept the bill for more than £. 40. The banker agreed to the acceptance to this extent, and in his account gave the respondents credit accordingly. The bill was retired on the 3d of April 1822; and on the 29th of May, M'Ewan received a letter from a law agent employed by the respondents, demanding payment of the original price of £. 46, 6s., and within fifteen days afterwards, an action was raised before the Court of Admiralty for that sum. Before defences were lodged, the respondents admitted payment of the £. 40, and restricted their conclusions to the balance. M'Ewan consigned £. 4, 14s., but contended that the action was incompetent, as the debt was under £. 25. The Judge-Admiral repelled that objection, and found M'Ewan liable in expenses. Before decree for them was pronounced, he brought an advocation, which the Lord Ordinary dismissed as incompetent, and found him liable in expenses. M'Ewan reclaimed, contending, that the advocation was competent, as it was brought on the ground of the original action being incompetent, which formed one of the exceptions in the statute. The Court, by a majority, adhered as to the incompetency, but unanimously altered as to expenses.

Their Lordships were all of opinion, that the competency of an action must be judged of from the conclusions; but one of them considered that this was

an attempt to defraud the law, and therefore ought to have been dismissed.

D. Gray,—J. Stuart,—Agents.

No. 655.

Hon. Mrs Hamilton Fullerton, Pursuer.—*Forsyth—Robertson.*
Sir H. D. Hamilton, Defender.—*Moncreiff—Jameson.*

Feb. 12, 1824.

Second Division M'K.

Tailzie—Succession—Prescription.—In 1688, John, Lord Bargany, in the contract of marriage of his eldest son, John, Master of Bargany, executed an entail, by which he destined the estate of Bargany to a certain series of heirs-male; whom failing, to the eldest heir-female of his own body, and her descendants without division. This entail provided, that all the heirs should bear the name and arms of Hamilton of Bargany 'as their 'proper surname, arms, and designation,' and prohibited them from altering the succession. It contained also the usual resolutive and irritant clauses, declaring that, in the event of any heir contravening the entail, 'the saids heirs of tailzie, 'male or female, and the descendants of his or 'her bodies sua contravening, shall ipso facto 'amit, lose, and tyne their right, title, and suc-'cession above specified, to the said lands and 'others above mentioned; and the samen, in the 'case foresaid, shall ipso facto fall, accresce, and 'pertain to the next heir of tailzie who would 'succeed if the contravener and the descendants 'of his or her body were naturally dead; and it

'shall be leisome to the said next heir of tailzie 'to establish the right thereof in his or her per-'son, either by adjudication, declarator, or ser-'ving heir to the person who died last vest and 'seased therein preceding the contravener, or by 'any other manner of way consisting with the 'laws of this kingdom.' The entail contained a procuratory of resignation, and was recorded in 1694. John, Master of Bargany, the institute, predeceased his father, without having been infeft, leaving an only daughter, Joanna Hamilton, who, in 1707, married Sir Robert Dalrymple, eldest son of the Lord President Dalrymple. His Lordship, by their contract of marriage, entailed his estate of North Berwick on Sir Robert and his heirs, in a certain order, declaring, 'that in case there shall 'be more sons than one of the foresaid marriage, 'and that the succession of the estate of Bargany 'shall fall and devolve upon the heirs-male thereof, 'then and in that case the said heir accepting of 'the said estate of Bargany, and the descendants 'of his body, shall ipso facto amit and lose all right 'and interest he had or could pretend to the lands, '&c. of North Berwick, and others hereby dis-'poned; and the succession thereof shall imme-'diately devolve to the next son of the said mar-'riage.' In this entail there was reserved to the Lord President a power to discharge or qualify any of its provisions. Sir Robert predeceased his Lordship, leaving issue of his marriage with Joanna Hamilton, viz. Sir Hew Dalrymple, (grandfather of the defender); John, (who afterwards assumed the name of Hamilton); Robert, (who

died without issue); and two daughters. The eldest of these daughters married the Master of Reay, and was the ancestor of the pursuer, Mrs Fullerton.

In the meantime John, Lord Bargany, had been succeeded by his second son, William, who, in 1709, served heir of tailzie and provision in general, under the entail 1688, to John, Master of Bargany, the institute; and on William's death, his son James was served heir-general of tailzie and provision; but neither of them were infeft under the entail. James had a daughter; and having died in 1736 without issue male, a competition arose between Mary Buchan, the descendant of his daughter; Sir Alexander Hope, the descendant of a daughter of John, Lord Bargany, the entailer; and Sir Hew Dalrymple, the eldest son of Joanna Hamilton. This competition was settled by a judgment of the House of Lords in 1738, finding, 'that the estate of Bargany did de-'scend to the said Sir Hew Dalrymple, the el-'dest son of the daughter and only child of John, 'Master of Bargany, and that he ought to be ser-'ved heir of tailzie and provision to the said 'James, Lord Bargany.'

Before this judgment was pronounced, Lord President Dalrymple had died, leaving two deeds, by which, in virtue of the powers reserved to him in his son's contract of marriage, he revoked the clause prohibiting the heir of the marriage from holding the estate of North Berwick as well as that of Bargany. The object of this new arrangement was, that his grandson, Sir Hew, might

serve heir under the entail of Bargany, and thereafter denude of it in favour of his brother John; and he appointed him to do so accordingly. This plan, however, was not carried into execution by Sir Hew, who, after possessing the Bargany estate on apparency merely, executed a deed of repudiation in favour of his brother John, on the narrative that, in case he should take the estate of Bargany, he 'would thereby forfeit the right to 'the estate of North Berwick' for himself and his descendants; and bearing, that he 'being fully 'resolved to take and hold the estate of North 'Berwick, and to allow the estate of Bargany to 'descend to and be taken by the said John Dal-'rymple, in the terms of the entail of the estate of 'Bargany,' repudiated and refused to accept of the succession of Bargany, and consented that John Dalrymple should serve heir of tailzie and provision to James, Lord Bargany, 'providing al-'ways, that these presents shall nowise prejudge 'my own or my descendants' right to take the 'succession of the said estate of Bargany upon 'failure of the said John Dalrymple, and Dr Ro-'bert Dalrymple, my third brother, and their de-'scendants, or in case any event shall exist, in 'which I or my descendants can take the said 'succession consistent with the foresaid tailzie of 'the estate of North Berwick; with which ex-'press provision these presents are granted by me, 'and accepted by the said John Dalrymple.' Founding on this repudiation, John Dalrymple, (who now assumed the name of Hamilton,) raised

a summons of declarator, in which he engrossed the deed of repudiation, and concluded to have it found, that 'he hath the only right and title 'to the succession to the said estate of Bargany, 'and that he ought to be served heir of tailzie 'and provision to the said James, Lord Bargany, 'in the said lands, after the form and tenor of 'the writs before narrated.' Decreet in absence having been obtained and extracted in terms of the libel, John Hamilton produced it as evidence of his legal right, and expede a general service as heir of tailzie and provision to James, Lord Bargany. The retour of the service bore, that John Hamilton, the second son of the deceased Sir Robert Dalrymple and Joanna Hamilton, 'est 'legitimus et propinquior hæres talliæ et pro- 'visionis dicto demortuo Jacobo Domino Barga- 'nie,' according to the marriage-contract of John, Master of Bargany, the judgment of the House of Lords in 1738, the deed of repudiation, and the decree of declarator, all which were described, but not engrossed in the retour. Having thus vested in himself a right to the procuratory of resignation in the entail or marriage-contract of 1688, (which had not hitherto been feudalised,) John Hamilton, in 1742, resigned the lands, and obtained a charter, containing the several provisions of the entail, and conveying them to him, 'filio secundo demortui Domini Roberti Dal- 'rymple, procreat. inter illum et demortuam Do- 'minam Joannam Hamilton, unicam filiam demor- 'tui Joannis, Magistri de Barganie, et sic hære-

'dem fæmellam demortui Joannis, Domini Bar-
'ganie, ejus avi, quibus deficien. aliis hæredibus
'quibuscunque ex corpore dict. Dominæ Joannæ
'Hamilton, procreat. inter illam et dict. Dominum
'Robertum Dalrymple, absque divisione;' and failing them, to the several other substitutes in the order of the original entail. In the quæquidem clause were narrated, but not engrossed, the several judgments and deeds, including the deed of repudiation, by which John Hamilton acquired right to the estate. On this charter John Hamilton was infeft on the 20th of August 1742, and he continued to possess the lands in virtue of it until 1780. Having no children, and his younger brother Robert being dead without issue, he at this period executed a disposition, by which, 'in order to give effect to the entail executed by 'John, Lord Bargany,' he disponed the estate of Bargany to himself, and the heirs of his body, without division; 'whom failing, to Sir Hew 'Dalrymple, Bart., my brother, and the heirs of 'his body, without division; whom failing, to the 'heirs of the body of John, Lord Bargany, afore-'said, and the other heirs of tailzie contained in 'the foresaid deed of entail, in the order therein 'expressed,' under all the provisions, &c. of the original entail, which were fully recited. On this new deed John Hamilton immediately took infeftment, and he possessed the estate under it till his death in 1796.

Prior to this event, and after the death of Sir Hew Dalrymple, who left a son, Sir Hew (second),

Mrs Fullerton, as the representative of the eldest daughter of the marriage of Joanna Hamilton with Sir Robert Dalrymple, brought a declarator of irritancy against John Hamilton and Sir Hew (second), on the ground that, by the execution of the deed of repudiation, the charter of 1742, and the disposition of 1780, John Hamilton, and his brother Sir Hew, had contravened the entail of 1688. This action was finally dismissed by a judgment of the House of Peers, finding, 'that the 'matters in the appellant (Mrs Fullerton's) sum-'monses complained of, are not sufficient to sus-'tain the conclusions in these summonses.'

The defender, the son of Sir Hew (second), having now succeeded and made up titles to the estate of Bargany, under John Hamilton's deed of 1780, Mrs Fullerton, in 1816, raised the present action, concluding for reduction of that deed, and of the titles made up under it. The ground on which she rested was, that the deed of 1780 was ultra vires of John Hamilton, and in contravention of the entail of 1688, and charter of 1742, under which he held the estate of Bargany.

Besides a general defence on the merits, it was pleaded for Sir Hew, the defender, that the judgment of the House of Lords in Mrs Fullerton's first action formed a res judicata. The Court repelled this plea, but on the merits assoilzied Sir Hew. Both parties having appealed,—Mrs Fullerton on the merits, and Sir Hew as to the plea of res judicata,—the House of Lords dismissed the appeal at Sir Hew's instance, and in the

other, remitted to this Court to reconsider their judgment, with directions to take the opinion of all the Judges. On the petition of Mrs Fullerton to apply this judgment, memorials having been ordered, she pleaded, that the deed executed by John Hamilton in 1780 was in contravention of the provisions of the entail 1688, and charter 1742; 1. Because by the repudiation of Sir Hew's grandfather, and the proceedings which followed, the succession opened in favour of John Hamilton, and the posterior heirs under the entail 1688;—that such being the case, the succession could not revert to the prior class of heirs, of which Sir Hew was a member, but belonged to her as the next heir of tailzie in order after John;—and that the condition in the deed of repudiation in favour of Sir Hew could not burden the succession, as it was not engrossed in the titles of the estate; 2. Because the devolution to the posterior heirs was fortified both by the vicennial prescription of John Hamilton's retour, and by a prescriptive possession by him, more than forty years, on the charter 1742 and deed 1780, both of which called him and the heirs of his body prior to Sir Hew, thereby establishing, by prescription, the right of the posterior heirs to the exclusion of the prior branch; and, 3. Because she was the heir called under the charter 1742, in which the destination was 'aliis hæredibus qui-'buscunque' of the body of Joanna Hamilton, which necessarily meant the other heirs of her body of the same character as John Hamilton,

that is, heirs posterior to that class to which Sir Hew belonged. On the other hand, Sir Hew contended, that the deed 1780 merely carried into effect the provisions of the entail 1688 and the charter 1742; and in answer to Mrs Fullerton's pleas, he argued, 1. That as there was no declarator of forfeiture against his grandfather Sir Hew, and who had never made up titles under the entail, the rights of his descendants, who were heirs of entail, could not be affected by his deed of repudiation;—that as that deed contained an express reservation of their rights, and formed the ground of the decree of declarator, of the retour, and charter 1742, in which it was specially referred to, these deeds must be held to have been qualified by the condition contained in the repudiation;—and that although John Hamilton, a posterior heir, was allowed temporarily to possess the estate, yet it necessarily reverted, on his death, to the prior class, in the same way as in the case of the existence of a nearer heir after a remoter heir has made up titles; 2. That John Hamilton's retour, declaring him to be the second son of Joanne Hamilton, was ex facie null, and consequently incapable of being prescribed: further, that the vicennial prescription of retours was merely personal to the party served, for otherwise it would supersede the necessity of the long prescription; and that, supposing the destination of the charter 1742 called Mrs Fullerton preferably, still it was not fortified by prescription prior to in-

feftment on the deed 1780, as thirty-eight years only had intervened; while, in consequence of intervening minorities, Sir Hew's right to reduce it, and the deeds on which it proceeded, had not been cut off by the negative prescription; and, 3. That the 'other heirs whatsoever' of the body of Joanna Hamilton, mentioned in the charter 1742, meant all the heirs of her body other than John Hamilton; and that of these Sir Hew was the eldest, and so entitled to succeed.

The Judges of the First Division, and the Lord Ordinary, gave an unanimous opinion in favour of the pleas maintained by Sir Hew, and the majority of the Second Division concurring with their Lordships, the following interlocutor was pronounced: 'The Lords having considered the re-'mit, &c. find, That the defender, under the 'destination of the entail executed by Lord Bar-'gany in 1688, and the judgment of the House 'of Lords in 1738, is the nearest heir of tailzie 'and provision now in existence entitled to the 'succession of the estate of Bargany, as the de-'scendant of the body of the eldest heir-female of 'the body of the said John, Lord Bargany, and 'that no contravention, irritancy or forfeiture 'ever was declared against him, his father, or 'grandfather, although an action for that pur-'pose was brought, in which the defender's fa-'ther and others were called as defenders, and in 'which decree of absolvitor was pronounced by 'the House of Lords; and find, that this being 'the case, no act whatever of Sir Hew Dalrym-

'ple, the defender's grandfather, could affect the
'interest of any of his descendants, being heirs of
'tailzie: Find, That nothing following from the
'deed of repudiation of Sir Hew Dalrymple, the
'decreet of declarator, or retour of John Hamil-
'ton's general service, could in law deprive the
'defender of his right of succession under the en-
'tail: Find, That the defender, by the destination
'of the charter 1742, is, according both to its le-
'gal construction and its true intention, called to
'the succession of the estate after John Hamil-
'ton, and the heirs whatsoever of his body; and
'that if it were now necessary, for the purpose of
'completing a title in his person, it would be in
'the power of the defender to obtain himself
'served heir of tailzie and provision to John Ha-
'milton, as the person last infeft in the estate:
'Find, That even if the pursuer could construc-
'tively be held entitled to the benefit of the char-
'ter 1742, her right has not been secured by the
'positive, nor that of the defender to set aside
'the whole proceedings cut off by the negative,
'prescription; and that the vicennial prescription
'of retours is not applicable to the case; and
'therefore, that the pursuer can have no title or
'interest to challenge the deed executed by John
'Hamilton in 1780, by which the defender's
'grandfather, and the heirs whatsoever of his
'body, were directly called to the succession on
'the failure of John Hamilton, and the heirs
'whatsoever of his body; but find, that for de-
'fending himself in this action, it is not neces-

'sary that the defender should institute any process of reduction: They therefore sustain the 'defences now pleaded for the defender against 'this action, assoilzie him from the whole conclu-'sions of the libel, and decern.'

Lords Robertson and Craigie differed from the other Judges, and held that Mrs Fullerton, in virtue of the repudiation, of the subsequent proceedings, and of the destination in the charter 1742, was now the heir under the entail 1688, and as such entitled to set aside the deed 1780.

Pursuer's Authorities.—(1.)—2. Stair, 5, 25; 2. Ersk. 3, 51; Creditors of Brighton, June 20, 1739, (10247); Munro, May 19, 1812, (F. C.).—(2.)—1617, c. 13; 2. Stair, 12, 15; 2. Bankt. 12, 1, & 3, 55; 3. Ersk. 7, 12-14; 2. Stair, 12, 15-17-25; 2. Bankt. 12, 1-2; 3. Ersk. 7, 4-5, & 8, 15.—(3.)—3. Stair, 5, 12; 3. Ersk. 8, 47; Earl of Dalhousie, Jan. 13, 1712, (14014); M'Lauchlan, Jan. 12, 1757, (2312).

Defender's Authorities.—(1.)—3. Stair, 5, 50; 3. Ersk. 8, 32; Lord Monmtstoun v. M'Kenzie, (14903); M'Kinnon, June 16, 1756, (6566).—(2.)—M'Ken. Obs. Act 1617, c. 13; 3. Ersk. 7, 19; Lamb, Jan. 11, 1673, (10984); Cases in Dict. Vol. II. 397, v. Succession; Smith, June 30, 1752, (10803); Durham, Nov. 24, 1802, (11920); Yaille, March 4, 1813, (F. C.)—(3.)—2. Craig, 15, 16; 3. Ersk. 8, 48; Earl of Selkirk, Jan. 8, 1740, as reversed in H. of L., (14941); Hay, June 26, 1771, &c. affirmed, (15425); Hay, April 6, 1774, affirmed, (F. C.); Ball, March 6, 1806, (F. C.); Richardson, July 5, 1821, (ante, Vol. I. No. 131).

H. Cannan, W. S.—Russell, Anderson & Tod, W. S.—Agents.

No. 656. J. M'GLASHAN, Pursuer.—*Moncreiff—Cockburn—Brodie.*
A. DONALDSON, Defender.—*Jameson—Whigham.*

Feb. 13, 1824.
FIRST DIVISION.
Lord Meadowbank.
S.

This was a special case, relating to the respective rights of the pursuer and defender, in an area of ground in the Cowgate of Edinburgh. The Lord Ordinary found that it belonged to them in common. But the Court altered, and found that it was the exclusive property of the pursuer.

FALCONER & JOHNSTONE,—MURRAY & INGLIS, W. S.—Agents.

No. 657. J. GLASS, Advocator.—*Jameson.*
W. M'INTOSH, Respondent.—*Pyper.*

Feb. 13, 1824.
FIRST DIVISION.
Lord Meadowbank.
D.

Advocation.—M'Intosh brought an action before the Sheriff of Lanarkshire, concluding against Glass for £.113, 2s.; and in evidence of part of the debt, he produced a list of debts by Glass, in which he was ranked as a creditor for £.88 : 19 : 9. In defence, Glass founded upon a discharge under a composition-contract; but the Sheriff-substitute found it not binding, and decerned in terms of the libel. Glass having reclaimed, the Sheriff-depute decerned against him 'for £.88 : 19 : 9, 'agreeable to the defender's list of debts, and with 'interest as libelled, reserving the pursuer's 'ther claims; and with this variation and expla-'nation, adheres to the interlocutor complained 'of.' Leave was then given to advocate, of which Glass availed himself. The case depended before

Lord Gillies for a considerable time, without any objection to the competency having occurred, either to his Lordship or the parties. When it came before Lord Meadowbank, however, his Lordship was of opinion that the judgment of the Sheriff-depute was 'a decerniture in terms of 'the conclusions of the libel, minus £.22 : 1 : 9, 'calculated to exhaust the summons;' that the reservation applied to any further claims to be made in any other action; and that as expenses were not decerned for, the advocation was incompetent. He therefore dismissed it; but as the objection to the incompetency was not stated by M'Intosh, found him not entitled to expenses. Glass reclaimed, and the Court being satisfied that the decree of the Sheriff-depute was truly an interim decree, reserving to M'Intosh to produce evidence of the balance, altered the interlocutor, and remitted to his Lordship to proceed in the advocation.

GIBSON & OLIPHANT, W. S.—CHARLES GORDON,—Agents.

MAJOR MACKAY, Petitioner.—*Bell.* No. 658.
H. J. ROLLO, W. S., Respondent.—*Jameson.*

Feb. 13, 1824.

SECOND DIVISION F.

Sequestration of Land Estate.—The late Mrs M'Kinnon executed a disposition in trust, of a landed property, in favour of Rollo, who was infeft on her death, and entered into possession. Major Mackay, her heir of line, having brought a reduction of the trust-deed, on the ground of deathbed, and arrested the rents in the hands of

the tenants, made this application to the Court to have the lands sequestrated, and a judicial factor appointed. The Court refused the application as incompetent.

D. MACLEAN, W. S.—H. J. ROLLO, W. S.—Agents.

No. 659.

J. BOYD, Advocator.—*Ro. Bell.*
AGNES M'KENNA, Respondent.—*Pyper.*

Feb. 14, 1824.

FIRST DIVISION.
Bill Chamber.
Lord Balgray.
S.

Clause—Stamp.—Boyd, in order to prevent a declarator of marriage being brought by M'Kenna, to establish that she was the wife of a person to whom he had served heir-at-law, bound himself to aliment a daughter whom she had by that person, 'till she arrived at fourteen years of age, 'and to provide a room free of rent, and to con-'tinue the said aliment to me (M'Kenna) here-'after, so long as I remain unmarried; and 'in the event of either my marriage or death, 'to convey and make over in favour, and for the 'benefit of the child, and the heirs of her body, 'the house I at present possess.' This agreement he bound himself to implement, by a regular stamped deed, if required. Two years thereafter, and M'Kenna being unmarried, she and her child brought an action before the Magistrates of Ayr, concluding for a title to the house. The Magistrates found, that by the spirit of the agreement, it was the intention of parties that Boyd was 'to convey the house, therein men-'tioned, in favour of the child and the heirs of 'her body, to take effect when she arrives at

'fourteen years of age; at which period, M'Kenna's right to a room free of rent ceases, or at her death, if that event shall happen before said period.' They therefore ordained him forthwith to execute a disposition in terms of the agreement, to take effect on the child arriving at fourteen, or on the death of M'Kenna, if that should happen sooner, declaring, that if the child should die without issue, the property should revert to Boyd. The Lord Ordinary refused a bill of advocation; and Boyd having in a petition objected that the missive was not stamped, the Court superseded judgment till this should be done. The missive having been stamped, they adhered; and, on a petition by M'Kenna, found Boyd liable in the expenses of stamping the document, including the penalty.

W. Guthrie,—R. Urquhart,—Agents.

J. Barbeton, (Executor of Platt,) Complainer. —*Greenshields.*
J. Stewart, (Campbell's Trustee,) Respondent, *Solicitor-General Hope.*

No. 660.

Inhibition.—The late Adam Platt being creditor of the company of Campbell and Macleod brought an action, concluding that they, 'as a company, and John Campbell, Archibald Macleod, and John Elliot Campbell, as the individual members of that company, ought and should be decerned,' &c. On the dependence Platt raised and

Feb. 14, 1824.
First Division.
Bill-Chamber.
Lord Mackenzie.
D.

executed letters of inhibition against John Campbell, on the 4th of July 1818. Decree in absence was, on the 19th of January 1819, pronounced against all the parties except John Campbell, who denied that he was a partner; but having admitted that he had guaranteed the debt, Platt inserted in his summons, immediately after the conclusion against him as a partner, this addition: 'And the said John Campbell, as an admitted 'guarantee for the said company, for the debt 'above mentioned.' The Lord Ordinary, on the 25th January 1820, in respect of that amendment, found Campbell liable for the debt, 'as guaran-'tee foresaid, and decerns against him therefor, 'in terms of the conclusions of the libel as amend-'ed.' Campbell's estate having been sequestrated, Brereton, as executor of Platt, claimed a preference in virtue of his diligence, but Stewart the trustee refused it, 'as the decree pronounced in 'the action appears to proceed exclusively upon 'the amendment of the libel, when the inhibition 'was laid upon the dependence created by the 'original summons, and before the libel was a-'mended.' Brereton complained of this judgment, contending, that the introduction of an additional medium concludendi, without any alteration on the conclusions themselves, could not invalidate his inhibition. The Lord Ordinary reported the case, requiring the parties particularly to advert to the practice, either of using or of not using the inhibition of new upon a depending action, when the libel upon which inhibition

had previously been used, was amended. The Court unanimously sustained the inhibition, and remitted to the trustee to proceed accordingly.

Respondent's Authorities.—Milne, Dec. 27, 1698, (8158); 2. Bell, 157.

C. J. F. Orr, W. S.—R. Roy, W. S.—Agents.

R. Speirs and Others, Complainers.— *D. Macfarlane.* R. & W. Walker, and P. Murdoch, Respondents. No. 661.

Sequestration.—Decree in absence on a complaint by Speirs, annulling the resolutions of certain creditors, by which they had removed him from the office of trustee, and appointed a new commissioner. Feb. 14, 1824. SecondDivision F.

J. Dunlop, W. S.— ——— Agents.

Heritors and Kirk-Session of Ettrick, Advocators.—*Solicitor-General Hope—Pringle.* W. & W. Sword, Respondents.—*Robertson.* No. 662.

Poor — Aliment — Parent and Child. — James Sword and his wife, two old and infirm paupers, applied for aliment to the heritors and kirk-session of the parish of Ettrick, in which they had their settlement. After an unsuccessful application to the respondents, the sons of the paupers, an allowance of 5s. per week was granted them Feb. 14, 1824. SecondDivision Bill-Chamber. Lord Eldin. M'K.

by the parish. Shortly thereafter, the heritors and kirk-session presented a petition to the Sheriff, praying him to decern against the respondents for payment of the sums already advanced, and to declare that they were bound to aliment their parents in future. The Sheriff having refused the petition, the heritors and kirk-session presented a bill of advocation. The respondents alleged, that they were unable, from poverty, to support their indigent parents, and contended that the parish was bound in law to support them, without any claim of relief. The Lord Ordinary refused the bill; but the Court recalled his Lordship's interlocutor, and remitted to the Sheriff to take a proof as to the circumstances of the respondents.

The Court were of opinion, that a parish, supporting a pauper is entitled to relief from every party liable to aliment him; and that the most correct mode of procedure, in such cases, is for the heritors and kirk-session to refuse the application for maintenance, either altogether, or in part, according to circumstances, so as to oblige the pauper to have recourse against those relations who were liable to support him.

W. Lang, W. S.—W. Horsburgh, W. S.—Agents.

No. 663.

J. Hunter, Pursuer.—*Cockburn*—*Sharpe*.
S. Carson, Defender.—*Fullerton*—*Maitland*.

Feb. 17, 1824.

First Division. Lord Alloway. D.

Guarantee.—Hunter raised action against Carson, stating, that while conveying sixty Highland bullocks to Dumfries market for sale, he met Car-

son and Gordon, with the former of whom he was acquainted, but not with the latter: That Gordon having proposed to purchase the cattle, Carson spontaneously mentioned that there was not a better man in Scotland for the price: That the sale was then made for £.427, on the supposition that cash was to be paid: That Gordon having, however, offered his bill at three months, this was at first declined; but that Carson having voluntarily asserted, that the bill was as good as that of the Bank of Scotland, the pursuer, relying on this statement, received the bill, and delivered the cattle; and that at this time Gordon was insolvent, which was known to Carson. He therefore concluded, that as the bill had been dishonoured, Carson ought to be decerned to pay the amount. The case having been remitted to the Jury Court, a verdict was returned, the substance of which is embodied in the Lord Ordinary's interlocutor, who pronounced judgment on the legal effect of the facts so ascertained, in these terms: 'Finds, 'That it is proved by the verdict, that James Gor- 'don did propose, in the defender's presence, to 'purchase from the pursuer the cattle, the price 'of which is in question, and that the pursuer 'was not acquainted with Gordon at the date of 'the transaction: That the jury also found, that 'before the pursuer did agree to sell and deliver 'the cattle to Gordon, the defender did say, that 'if the said James Gordon purchased the said cat- 'tle, there was not a better man in Scotland for 'the price of them: That before the pursuer a- 'greed to sell and deliver the cattle to Gordon,

'the defender did say that the pursuer might take 'his (Gordon's) bill at three months, without the 'smallest hesitation, as it was as good as the Bank 'of Scotland: That Gordon was insolvent at that 'time; but that the defender was not then aware 'that Gordon was insolvent, or in bad circum-'stances; and that Gordon was reputed to be in 'good credit at and after the date of that trans-'action.' From these facts his Lordship found, 'That although the defender, when he used the 'expressions above mentioned, was not aware 'that James Gordon was insolvent, or in bad cir-'cumstances, yet this expression must have in-'duced the pursuer to deliver the cattle to Gor-'don upon credit, and notwithstanding this re-'presentation, Gordon was altogether insolvent, 'and therefore decerns against the defender, in 'terms of the libel.' Carson reclaimed, and contended, that nothing short of deliberate falsehood, or of culpable rashness, devoid of all reasonable grounds of belief, (which had not been established,) could render him liable for the colloquial expressions employed by him in describing Gordon's circumstances. To this it was answered, that he was the means of deceiving Hunter as to the true state of Gordon's affairs, and that, by the rash and spontaneous description of the opulence of that person, when the contrary was the fact, he had been the cause of credit being given. The Court adhered.

The Judges were chiefly influenced by its being proved, that the description given by Carson was spon-

taneous, and not a mere opinion delivered in consequence of a question being put to him by Carson.

Pursuer's Authorities.—Crichton, &c. June 20, 1797, (8230); Corbet v. Gray, 1794, (not rep.); Murray, May 15, 1812, (F. C.); Taylor v. Waddell, 1803, (not rep.); Brown v. Porterfield, 1816, (not rep.); 1. Bell, 284.

Defender's Authorities.—29. Char. II. c. 3, § 4.; Fell on Guar. 317, 499, App. No. 11.

WELSH & EWART, W. S.—CORRIE & WELSH, W. S.—Agents.

A. ROY, Advocator.—*Dean of Faculty Cranstoun—Irving—Forsyth.*
W. YOUNG and F. WILSON, Respondents.—*Solicitor-General Hope—Alison.*

No. 664.

Feb. 17, 1824.

SECOND DIVISION
Bill-Chamber.
Lord M'Kenzie.
M'K.

Jurisdiction—Act of Grace.—Roy having been incarcerated in the jail of Irvine, for payment of a game certificate duty and the statutory penalty, in virtue of a warrant of two of the commissioners of supply of the county of Ayr, proceeding on a general order from the Barons of Exchequer to levy the arrears of assessed taxes in that county, applied to the Magistrates for aliment under the act of grace. Answers were lodged for the sub-collector and the solicitor of taxes, who contended that Crown debtors were not entitled to the benefit of the act of grace. The Magistrates refused the prisoner's application. A bill of advocation having been presented by Roy, the respondents, on the part of the Crown, objected to the jurisdiction of the Court, and contended, that the claim for aliment, being a debt attempted

to be constituted against the Crown, and in reference to a revenue question, it was competent in the Court of Exchequer only, in virtue of the 6. Anne, c. 26. For Roy, it was, on the other hand, maintained, that by the application under the act of grace, he claimed nothing from the Crown, so as to constitute a debt against it, but only demanded his liberty, which the Crown had the option of preventing, by paying an aliment; and that as the Court of Exchequer could not advocate the judgment of the Magistrates refusing him aliment, he would be precluded from the possibility of any relief if this Court declined to interfere. The Lord Ordinary, on advising with the Court, refused the bill as incompetent, in respect the Court had no jurisdiction; and thereafter a petition was refused, without answers.

Respondent's Authorities.—6. Anne, c. 26, § 8, 11; Ramsay, July 11, 1747, (7590); Lord Hopetoun, Dec. 15, 1807, (F. C.)

J. Irving, W. S.—*F. Wilson*, W.S.—*Agents.*

No. 665. G. Henderson and R. Gardiner.—*Forsyth.*
A. Wilson & Co.—*Murray—Gibson Craig.*

Feb. 17, 1824.

Second Division. Lord Cringletie. B.

Cautioner.—Cunninghame, Stevenson & Co. brought a suspension against Wilson & Co., of which Gardiner, (who was interested to support the charge), agreed to relieve them. For that purpose he induced Henderson to become his cautioner, and put into his hands £574, for his relief. The letters having been found orderly proceeded,

and a reduction of this decree having been dismissed in hoc statu, Henderson brought a multiplepoinding relative to the fund in his hand, and to get his bond restored to him. To this Wilson and Co. objected, that they were not yet in safety, seeing the reduction was only dismissed in hoc statu, and an appeal was competent. The Lord Ordinary, before answer, ordered intimation to be made to Cunninghame, Stevenson & Co., with certification, that if they did not appear and object within a certain period, they would be foreclosed, and the bond delivered up. Wilson & Co. reclaimed; but the Court adhered, except as to the certification, which they recalled.

A. Paterson,—Gibson, Christie & Wardlaw, W. S.—Agents.

J. Forbes and Forbes, Hogarth & Co. Pursuers. —*Dean of Faculty Cranstoun—H. J. Robertson.* F. Smith, Defender.—*Cockburn—Matheson.*

No. 666.

Feb. 19, 1824.

First Division. Lord Meadowbank. D.

Property—Salmon-Fishing—The river Findhorn, which discharges itself into the Moray Frith, originally flowed in two channels opposite to the lands of Waterford, one of which formed the boundary. About the year 1782, the water in this bounding branch forced its way through the lands of Waterford, creating a third channel, and leaving a small island. The proprietor of Waterford shut up this new channel; but, about twenty years ago, the water overcame the bulwark, and returned to its former course, where it

has since been allowed to flow. To prevent farther encroachments, an embankment was made on the lands of Waterford, which were afterwards acquired by Smith. Forbes was proprietor of the salmon-fishings on the river, which he let to Forbes, Hogarth & Co. In various parts of it they had erected '*Sights*,' which were stone-dikes erected in alveo fluminis, at the head of the fords or shallows, to enable the fishers to see the fish as they passed up the river. Having constructed one of these sights in the new channel, and also a towing path of stone-work on the opposite bank, and across the mouth of the centre channel to the island, Smith presented a petition to the Sheriff of Elgin, praying him to ordain these erections to be removed, and to prohibit them being made in future. The Sheriff granted warrant and interdict, in respect that neither Forbes nor his tenants have a right to place obstructions of any kind whatever in the river Findhorn, in consequence of their right of fishing in that river.' Forbes and his tenants then brought a declarator, to have it found, that they, 'in the exercise of their rights of salmon-fishing in the said river of Findhorn, and the several branches or streams thereof, are entitled to make and construct sights and towing paths in the channel and along the banks of the said river, and of the several branches or streams thereof;' that Smith had no right to prevent them from doing so in the channels opposite his property; and that he ought to be ordained to remove the embankment made by his predecessor, and extended

by himself along the lands of Waterford. Against this action Smith pleaded, 1. That the right of fishing did not entitle Forbes and his tenants to make erections in alveo fluminis; 2. That although they may have acquired a prescriptive right to such erections in other parts of the river, yet they had none opposite to his lands; and, 3. That the towing path and sights were injurious to his property, by causing the water to regorge; and that the embankment was necessary for its protection. An advocation having been brought of the Sheriff's judgment, the Lord Ordinary, after issuing the draft of an interlocutor, containing special findings in point of law, and remitting the case to the Jury Court, reported it on informations. The Court unanimously sustained the defences, and assoilzied Smith; and thereafter refused a petition.

The Judges considered this to be a very clear case; that Forbes and his tenants had no right to make any operations in alveo fluminis; and that as several of the findings of the Lord Ordinary were doubtful, the defences ought to be sustained simpliciter. It was also observed from the Chair, that although a right of salmon-fishing may entitle a party to draw nets upon the opposite banks, yet that it gave no right to construct towing paths.

Pursuers' Authorities.—L. Monymusk, Dec. 18, 1623, (10840); Mathew, Jan. 18, 1612, (14263); 1. Dallas' Styles, 208.

Defender's Authorities.—Farquharson, June 25, 1741, (12779); Fairlie, Jan. 26, 1744, (12780); Mag. of Aberdeen, Nov. 22, 1748, (12787); Trotter, July 9, 1757, (12798); E. of Kinnoul, Jan. 18, 1814, (F. C.)

M'Kenzie & Innes, W. S.—T. M'Kenzie, W. S.—Agents.

No. 667. P. M'EACHERN, Pursuer.—*Moncreiff*—*A. Wood*.
R. EWING & Co. Defenders.—*Gillies*.

Feb. 19, 1824.

SECOND DIVISION
Lord Cringletie.
B.

Sale—Local Usage.—Grant deposited in a bonded warehouse in Greenock, kept by Ewing & Co. two puncheons of rum. The bills of lading were in the hands of his agent, M'Eachern; and Grant having sold one of the puncheons, in August 1814, to Menzies, he sent an order of delivery to M'Eachern. Thereafter Menzies sold the puncheon to Gordon, and intimated this to M'Eachern. No notice of either of these sales having been given to Ewing & Co., and the rum having been two years in bond, they wrote to Grant, that if the duties were not paid, it would be sold by the public officers. In answer Grant wrote them, 'I received yours, &c. respecting the puncheon of 'rum ex Jane, which I sold to a Mr Menzies 'here, in August 1814, who informs me that he 'will pay the duties before the present bond ex-'pires.' Menzies afterwards inclosed to Ewing and Co. money 'to pay excise and custom du-'ties, &c. on my puncheon rum ex Jane, which 'I will thank you to forward per first carrier.' Ewing & Co. accordingly paid the duties, and forwarded the rum to Menzies. An action was then raised by Gordon against M'Eachern before the Sheriff of Renfrewshire for the price, and decree obtained. M'Eachern thereafter brought an action against Ewing & Co. for payment of the sums in which he had been found liable to Gordon, on the ground that they ought not to have delivered

the rum to Menzies without production of the original order of delivery, or of an order from him; and he offered to prove, that it was the usage of the port of Greenock, that goods in bond were never delivered without the order coming through the importer's agent; and he contended, that Grant's letter to Ewing & Co. was not equivalent to an order of delivery to Menzies. The Lord Ordinary assoilzied Ewing & Co., and the Court adhered.

The Court refused to allow any proof of the alleged local usage, both on account of its being totally opposed to general practice and principle, and contradicted by the averments of M'Eachern in his action with Gordon in the Sheriff-court.

A. GRAY, W. S.—J. THORBURN,—Agents.

MRS E. HENRY and Others, Pursuers.—*Solicitor-General Hope—Bruce.*
W. GRANT, Defender.—*Murray—More.*

No. 668.

Feb. 19. 1824.

SECOND DIVISION
Lord Cringletie.
M'K.

Legacy.—Mrs Callender executed a deed of settlement, by which she conveyed her property to trustees, whom she named her executors and universal legators, for the purpose of dividing her property into three shares, one-third to be paid to Grant, one of the trustees and father of the defender, another third to Misses Henry, and the other to be vested in securities, and the yearly produce to be paid to her nephew, Henry Callender, 'which yearly produce I do hereby legate and 'bequeath, as an alimentary annuity, to the said

'Henry Callender, and declare the same to be 'no ways affectable by his debts and deeds; and 'after the death of the said Henry Callender, I 'do hereby appoint my trustees to convey and 'assign the securities so to be taken to them-'selves, or to uplift the same, and pay the money 'to any person or persons to whom the said Henry 'Callender shall bequeath the same; I hereby 'giving him full power and liberty to dispose of 'the whole of the said third part, in such way and 'manner as he shall think proper, by any deed 'to be granted by him, either in the English or 'Scotch form, to take effect after his death; but 'declaring, that notwithstanding this power and 'liberty, the same shall not be affectable by any 'debts contracted, or to be contracted by the 'said Henry Callender; and failing his making 'such deed or settlement, I hereby appoint my 'trustees to assign and convey the said securities 'themselves, or to uplift the same, and pay the 'money to the heirs-at-law, agreeably to the law 'of succession in Scotland, of the said Henry 'Callender.' Henry Callender predeceased the testator, leaving a will, by which he bequeathed all his property and effects, over which he had any disposing power, or in which he had any beneficial interest, to Grant, the defender's father, and his heirs and executors. On Mrs Callender's death, Misses Henry raised action against Grant, as representing his father, (who, previous to his death, had become Mrs Callender's sole surviving trustee,) for payment to them of the funds provided to Henry Callender, as heirs-at-

law of him and of Mrs Callender. To this Grant answered, 1. That he was entitled to these funds in virtue of Henry Callender's will in favour of his father; and, 2. That, at least, if that will were not effectual, the legacy had lapsed, and a share of it fell to him in virtue of his father's appointment as executor and universal legator. The Lord Ordinary found, that the legacies 'could 'not be disposed of by Henry Callender by his 'will, in respect that he predeceased his said 'aunt, whereby the legacies never were vested in 'him, so as to entitle him to will them away;' and 'that by Henry's death the said legacies did not 'lapse, but now belong to the nearest of kin at 'the time of his death.' And the Court adhered.

The Court were of opinion, that the power given to Henry Callender by the trust-deed was not a power to name an heir, but only to bequeath, which he could not do, until by survivance the funds were vested in him, or in the trustees for his behoof.

Pursuers' Authority.—Graham, Feb. 17, 1807, (F. C.)
Defender's Authorities.—Gilly, Dec. 24, 1709, (8061); Snodgrass, Dec. 16, 1606, (F. C.); Dunlop, June 2, 1812, (F. C.)

T. Bruce Jun. W. S.—J. Arnott, W. S.—Agents.

Baring, Brothers & Co. Pursuers.—*Solicitor-General Hope—R. Thomson.*
D. Wight, Defender.—

No. 669.

Feb. 19, 1824.

Second Division
Lords Pitmilly and M'Kenzie.

Inhibition—Process.—This was an ordinary action at the instance of Baring, Brothers & Co. against Wight, concluding to have it declared, that

an inhibition used by him in 1809, on a depending action, which had been allowed to remain asleep since 1812, was null, or had fallen to the ground, and for warrant to have it scored. The defence was, that an application to the Court was the only competent method of having an inhibition scored or recalled. The Lords Ordinary successively dismissed the action as incompetent; and the Court refused a reclaiming petition, without answers.

J. Mowbray, W. S.—J. G. Balfour, W. S.—Agents.

No. 670.

A. Cooper, Advocator.—*Jameson—Currie.*
A. Hamilton, Respondent.—*M'Neill—et e contra.*

Feb. 20, 1824.

Second Division
Lord Pitmilly.
F.

Reference to Oath—Expenses.—Hamilton, a writer, raised action before the Sheriff of Ayr against Cooper, for payment of a business account. Cooper having pleaded prescription, Hamilton immediately referred resting owing to his oath. After a long litigation, Cooper at last emitted a deposition, in which he denied some of the items of the account, and as to others, stated his belief that they had been paid by his factor. The Sheriff, in respect of this oath, assoilzied him, but found neither party entitled to expenses. Both parties advocated; Hamilton on the merits, and Cooper as to expenses. In the advocation at Hamilton's instance, the Lord Ordinary appointed production of the factor's books, which did not support Cooper's oath of credulity; and his Lordship therefore decerned against him for the

items said to have been paid by the factor, and for some others admitted in the deposition not to have been paid, and found expenses due to neither party; and in the advocation at Cooper's instance, he remitted simpliciter, and found him liable in the expenses incurred in this Court. Cooper reclaimed in both processes, but the Court adhered.

J. S. HALL, W. S.—J. BOWIE, W. S.—Agents.

W. C. LEARMONTH, Advocator.—*Cockburn—Rutherfurd.*
J. BAIRD and Others, Respondents.—*Solicitor-General Hope—Macdonald.*

No. 671.

Feb. 21, 1824.

FIRST DIVISION. Lord Alloway. D.

Road.—This was a question whether a road was a public or private one. Learmonth, on the supposition that it belonged to himself, was proceeding to cut a ditch across it, when he was interdicted by the inferior court. Having brought a declarator of his right, and an advocation, the former was remitted to the Jury Court, and the Lord Ordinary sisted the latter till the verdict should be pronounced. The Court, being satisfied that a possessory right had been established by the respondents, adhered.

A. PEARSON, W. S.—LINNING & NIVEN, W. S.—Agents.

No. 672. J. LIVINGSTONE, Petitioner.—*M'Neill.*
W. LEARMONTH & Co. and MANDATARY, Respondents.—*Solicitor-General Hope.*

Feb. 21, 1824.
SECOND DIVISION
F.

Inhibition.—W. Learmonth & Co. raised an action against the late Alexander Livingstone, as a partner of Learmonth and Sons, for a debt due them by that Company, and used inhibition on the dependence. Livingstone was assoilzied, on the ground that he was not a partner, reserving to the pursuers any claim they might have against him as partner of J. S. Learmonth & Co. The judgment of the Court having been affirmed on appeal, Livingstone's son, the petitioner, applied to the Court to recall the inhibition. This was opposed by W. Learmonth & Co., on the ground that, under the reservation, they were still entitled to insist against him for their claims on J. S. Learmonth & Co. without raising a new action; but the Court recalled the inhibition, with expenses.

A. DOUGLAS, W. S.—W. COOK, W. S.—Agents.

No. 673. S. JOLLY, Advocator.—*Skene.*
F. GRAHAM, Respondent.—*Keay.*

Feb. 24, 1824.
SECOND DIVISION
Lord Cringletie.
M'K.

Entail—Passive Title.—The late W. Graham possessed the estate of Morphie, under an entail duly recorded, which prohibited the heirs from contracting debt. He was also proprietor of the estate of Ballendarg, in virtue of another entail, which was not recorded till 1792, some years af-

ter his death, and he held certain other lands in fee-simple. In 1762, he granted to one Gibson a lease of part of the estate of Morphie for fifty-seven years, by which he bound himself, 'his 'heirs, successors, and executors whatsoever,' 'at 'the expiration of this tack, to pay or allow to 'the said William Gibson, and his foresaids, the 'value of all those dikes,' buildings, and other specified ameliorations which he might make on the farm; and it was provided, that the houses, &c. should be valued at his entry, in order that the extent of ameliorations might be more easily ascertained at the issue of the lease. In 1785, Robert Graham, the eldest son and heir of William, let to Gibson a small pendicle, for the period which the former lease had to run, by a tack which referred to the previous lease, and contained similar clauses as to ameliorations. The houses under the first tack having been omitted to be valued at the tenant's entry, an appraisement was drawn up and subscribed by Robert Graham, in 1792, shortly after the recording of the entail of Ballendarg. Robert Graham died, leaving a son, at whose death, Francis Graham, the respondent, Robert's younger brother, succeeded to the estates of Morphie and Ballendarg, while an only daughter inherited the unentailed property. Francis had besides previously received from his brother Robert £.900, in virtue of a bond of provision executed by their father in implement of his contract of marriage, in favour of his younger children, and payable at his death, or on their marriage. Gibson, in 1799, assigned to

Jolly, the advocator, his two leases; and on that occasion Francis Graham signed a declaration on the back of the second tack, certifying the value of the houses on the pendicle thereby let to have been of a certain amount at the date of entry. He afterwards continued to draw the rents from Jolly till the expiry of the leases, and he also entered into a submission with him as to the mode of cropping to be followed. In 1820, when the lease expired, Francis Graham raised action before the Sheriff of Kincardine for payment of arrears of rent, which was met by a plea of compensation for improvements on the part of Jolly, who brought a counter action for payment of those ameliorations, both of which came into this Court by advocation, and were conjoined. Jolly contended, 1. That the prohibition in the entail of Morphie, to contract debts, did not strike against the obligations of a lease; 2. That Graham, rebus et factis, had adopted the leases; 3. That, by succeeding to the estate of Ballendarg, (the entail of which was unrecorded when the tacks in question were granted), Graham was bound to implement them; and, 4. That he was also liable to implement his father's obligations as an heir of provision. Graham answered, 1. That the obligation to pay money at the expiry of a lease is in reality a debt; 2. That an heir of entail, by availing himself of a reducible deed, does not thereby approve of it; 3. That the appraisement of the buildings on the farms having taken place, and the principal part of the ameliorations having been made subsequent to the

recording of the entail of Ballendarg, he was not liable as succeeding to that estate, or, at all events, he could only be called on suo ordine after the heir of line; and, 4. That the bond of provision being payable at his marriage, which might have happened prior to his father's death, he was a creditor of his father, and not an heir of provision. The Court, on the report of the Lord Ordinary, found Graham liable to implement the conditions of the tacks, 'in respect of his own approbatory 'acts,' and suo ordine, 'in respect of his having 'succeeded to the estate of Ballendarg, and that 'the entail thereof was not recorded till after the 'dates of the said tacks;' and remitted to the Lord Ordinary to hear parties as to the extent of his liability.

The Court were of opinion, that, although there might possibly be cases where an obligation to pay for ameliorations, at the expiry of a lease, would not fall under a prohibition to contract debts, yet it did so in the present case; that the mere receipt of the rents, payable under the leases, did not infer any liability on the part of Graham; and that he, in reference to the bond of provision, was a creditor and not an heir.

Advocator's Authorities.—(2.)—Earl of Kinnoul, Jan. 18, 1814, (F. C.).—(3.)—Smollet, May 14, 1807, (F. C.); 3. Ersk. 8, 52-3.—(4.)—3. Ersk. 8, 39-51.

Respondent's Authorities.—(1.)—Dillon, Jan. 14, 1780, (15432); Webster, Dec. 1791, (15439).—(4.)—3. Ersk. 8, 40.

R. BURNETT, W. S.—J. BROWN & J. LAWSON, W. S.—Agents.

No. 674.

W. Fraser, Pursuer. *Robertson.*
Captain Matheson, Defender.—*Baird.*

Feb. 24, 1824.

Second Division
Lord Cringletie.
B.

Contract—Lease.—Fraser offered, by missive, to take Captain Matheson's farm of Easter Suddy at the rent of two guineas per acre, 'for all not now 'let of said farm;' and Matheson, by a corresponding missive, accepted 'the terms you have of-'fered for the farm and mains of Easter Suddy as 'now to let;' but no mention was made of the extent of the farm. At the time when these missives were interchanged, Forsyth, the tenant of a contiguous farm, also the property of Captain Matheson, was in possession of a few acres of the farm of Easter Suddy, in virtue of certain stipulations in his lease. Captain Matheson having failed in an action, instituted by him for the purpose of having Forsyth removed from these acres, Fraser raised an action of damages, or to have the lease reduced, on the ground that he had not got possession of all the land let to him. It was pleaded in defence, that, by the missives, no more was let to him than what should prove to have been truly out of lease at the time. The Lord Ordinary assoilzied Captain Matheson, and the Court adhered.

H. M'Queen, W. S.—T. M'Kenzie, W. S.—*Agents.*

A. THOMSON, Suspender.—*Forsyth—Cockburn.* No. 675.
J. BOYD, Charger.—*Solicitor-General Hope—Ferguson—L'Amy.*

Feb. 25, 1824.

FIRST DIVISION.
Lord Meadowbank.
D.

Small Debt Act—Suspension.—Boyd, as tacksman of the Fishmarket customs in Edinburgh, let a salmon-stall to Thomson, agreeably to the regulations established by the Magistrates, at 5s. per week. Thomson having run into an arrear of 40s., Boyd brought an action against him, under the small debt act, before the Magistrates, as Justices of the Peace, for payment of the amount, as 'stall 'rent.' Having obtained decree, Thomson suspended, on the ground, 1. That if the claim were to be considered as for custom, the Magistrates had illegally increased its amount from what it formerly was; and, 2. That if it were rent, then the action was incompetent, under the 20th section of the small debt act. To this it was answered, That the sum was rent, and that as there neither was, nor could be any objection to the title, the suspension was incompetent, under the 13th section of the act. The Lord Ordinary repelled the objection to the competency of the suspension. But the Court, being satisfied that the claim was for rent, and that the title was not brought into question, unanimously altered, and dismissed the suspension as incompetent.

Suspender's Authorities.—Reid, Dec. 6, 1810, (F. C.) *; 1. Jacob,

* Boyd stated, that the case of Reid was erroneously reported, and that the facts were these:—The Magistrates let stalls to fleshers deal-

Dic. 282; Fleshers of Kirkcaldy, Sept. 17, 1822, (ante, Vol. II. No. 92.).

Charger's Authorities.—1, St. 9, 41; Johnson, Jan. 19, 1809, (7634); Turnbull, Feb. 14, 1801, (App. No. 9; Juriid.) Fyfe, Feb. 8, 1823, (ante, Vol. II. No. 180.).

T. Baillie,—Macritchies, Bayley, & Henderson,—Agents.

No. 676.

A. Thomson, Pursuer.—*Forsyth—Cockburn.*
A. Boyd, Defender.—*Solicitor-General Hope—Ferguson—L'Amy.*

Feb. 25, 1824.

First Division. Lord Meadowbank. D.

Small Debt Act—Reduction.—Along with the suspension in the preceding case, Thomson brought a reduction of the decree of the Justices of the Peace, on various grounds; but he did not allege either iniquity or oppression. Boyd having objected to the competency, the Lord Ordinary, 'in respect it is admitted, that the original action was brought under said act for payment of rent, which is expressly excluded by the statute, sustains the action of reduction, on the head of incompetency, in the original action.' But the Court unanimously altered, and dismissed the action.

T. Baillie,—Macritchies, Bayley, & Henderson,—Agents.

ing in veal exclusively at 1s. 8d. per week, and to those dealing in meat generally at 10s. 6d.; that a dealer in veal having converted his stall into a general one, and having been charged for 10s. 6d., the Court suspended the charge against him 'as a dealer in veal exclusively;' but without prejudice to the Magistrates 'claiming an additional rent, 'in the event of the suspender dealing in any other butcher meat in 'the stalls in question.'

G. COMBE, Suspender.—*Rollo.* No. 677.
W. TRAQUAIR, Charger.—*Fullerton.*

This was a suspension of a charge on a promissory-note, which resolved into a question of accounting. The Lord Ordinary repelled the reasons, and the Court adhered.

Feb. 25, 1824.
FIRST DIVISION
Lord Alloway.
H.

P. HEWAT, W. S.—J. SOMMERVILLE junior,—Agents.

COLONEL CAMPBELL, Pursuer.—*Dean of Faculty Cranstoun—Murray—Riddell.*
LADY M. L. CRAWFORD.—*Solicitor-General Hope—Alison.*

No. 678.

Jurisdiction—Peerage.—In 1820, Colonel Campbell was served heir of provision in general of George, Earl of Crawford, in terms of a royal charter, dated 28th April 1648, so far as regarded the peerage and honours. This charter embraced also the landed property in which Lady M. L. Crawford was feudally vested. Founding on this service, Colonel Campbell brought an action of exhibition and delivery against Lady M. L. Crawford of the 'writings, rights, and titles 'in her possession and custody, relating to the 'transmission of the honours, dignities, and es-'tates of the Earldom of Crawford and Lindsay;' on several of which he condescended. Against this action she objected, that it was incompetent, because the conclusions were grounded upon an alleged right to a peerage, of which the titles

Feb. 25. 1824.
FIRST DIVISION.
Lord Alloway.
H.

were said to be an accessary; and that as the right of peerage was thus the foundation of the action, and did not arise incidentally, the Court had no jurisdiction, seeing that they must necessarily, in the first place, inquire into the validity of the right to the peerage, before they could order the titles relative to it to be delivered. To this it was answered, that the action was a substantive one for the exhibition of writs, upon the ground of a right of property in them, and not in modum probationis of the peerage; that by the service, the property of all the titles conveying the honours only were vested in Colonel Campbell exclusively, and those which included both the lands and honours belonged to him jointly with her Ladyship. The Court, on the report of the Lord Ordinary, before farther answer, remitted to one or other of the Clerks of Court 'to examine Lady Mary Lindsay Crawford's charter-chest, or other repositories containing the family papers, for the deeds called for by the pursuer, in his information, and to select the same if found;' and thereafter adhered.

On this case a considerable difference of opinion existed on the bench. Lord Succoth and Lord Gillies were of opinion, that as there was no patrimonial right involved, but only a claim for the exhibition and delivery of title-deeds, as accessaries of a peerage, and as the Court could not investigate whether the right of the peerage was well or ill founded, they must therefore dismiss the action as incompetent. The other Judges considered the action competent, because Colonel Campbell had a title to the

property of these deeds vested in him by the service, —that the charter-chest belonged not exclusively to Lady M. L. Crawford, but also to him, and that having condescended upon deeds, which, from the former union of the honours and lands, must necessarily be there, he was entitled to exhibition and delivery of them, under the controlling inspection of the Clerk of Court.

Pursuer's Authorities.—Sir W. Dunbar, Feb. 2, 1709, (7395); Kerr, July 7, 1804, (17984); Kames' Law Tr. 227; 1. St. 7, 14.
Defender's Authorities.—1. Ersk. 2, 8; D. of Hamilton, Nov. 28, 1761; Bell on El. Law, 24.

J. & W. Ferrier, W. S.—G. Lyon, W. S.—Agents.

J. Brown, Pursuer.—*D. M'Farlane.*
Mrs Stewart and Others, Defenders.—*Alison.*

No. 679.

Feb. 25, 1824.

Second Division
Lord Cringletie.
F.

Passive title—Vitious Intromission.—Brown pursued Mrs Stewart, and Peter and James Stewart, as having incurred a representation to the deceased James Stewart, husband of Mrs Stewart, and father of the other two defenders, on the passive title of vitious intromission. The facts were these: A contract of separation had been entered into, in 1801, between Mrs Stewart and her husband, which had been signed by the latter only, and had not been acted on till 1811, when an actual separation took place. After this, Mrs Stewart continued to reside in a separate house, which she furnished out of her own funds, until 1815, when her husband being on deathbed, and utterly

destitute, she received him into her own house, and attended him for a few days preceding his death. Brown contended that this amounted to a rescinding of the contract of separation, (which he, besides, insisted had never been complete), whereby the husband had acquired right, jure mariti, to the furniture in Mrs Stewart's house, and that she, therefore, by possessing it after his death, had incurred a passive title. As to the sons, it appeared that their grandfather had executed a settlement, conveying a certain sum to trustees, for the purpose of paying to their father a specified annuity, payable by advance, and declaring that the principal, and the surplus interest after providing an annuity to his widow, was to belong to his sons. Prior to his death, the father had raised action against the trustees, for payment to himself of the surplus interest of this fund, and had obtained decree by the Lord Ordinary in his favour. After his death his sons sisted themselves parties, as 'fiars' of the fund, on which the Lord Ordinary decerned of new in their favour, 'as fiars, and as representing the liferent-'er;' and they afterwards received from the trustees the interest payable at the term immediately succeeding their father's death. It was contended for Brown, that they had thus acted as representing their father; and for the sons, that they had sisted themselves merely as fiars, although the Lord Ordinary had erroneously pronounced decreet in their favour, as 'representa-'tives,' and that the annuity having been paid in

advance, no part of the interest was due to their father at his death; and, besides, that all the interest received by them had been exhausted by the deathbed and funeral expenses. The Lord Ordinary deemed in terms of the libel, but the Court altered, and found, 'that the pursuer has 'not yet sufficiently condescended on any facts 'inferring a passive title against the petitioners,' and remitted to the Lord Ordinary to receive any further allegations on the part of the pursuer.

The Court were of opinion, that there was no vitious intromission, so as to make the defenders liable in an universal representation.

GRAIG & PADDIE, W. S.—J. DICKIE, W. S.—Agents.

No. 680.

LORD DUNDAS, Pursuer.—*Jardine—Speirs.*
A. GIFFORD, Defender.—*A. Bell—More.*

Feb. 26, 1824.

FIRST DIVISION. Lord Meadowbank. H.

Jurisdiction — Superior and Vassal — Udal Rights.—Lord Dundas, as heritable proprietor of the earldom of Orkney and lordship of Zetland, under titles derived from the Crown, has right to certain feu and umboth duties, scatt, wattle, sheep and ox money, payable by the heritors and udallers. Mr Gifford, the proprietor of the estate of Busta in Zetland, holding of the Crown, is bound, by the reddendo in his charters, to pay feu and umboth duties, with scatt, wattle, sheep and ox money, 'conform to the rentals' of the lordship. An action of declarator having been brought by Lord Dundas, to have it found that these duties were debita fundi, and

exigible from the proprietor, Mr Gifford pleaded in defence, 1. That as this was a question between a party in right of the Crown, and one of its vassals, relative to the payment of duties, it belonged to Exchequer, and therefore the Court had no jurisdiction; and 2. That although the feu-duties were debita fundi, yet the scatt, wattle, &c. were debita fructuum, being, according to immemorial usage, payable by the tenants only when the lands produced fruits, but that where the lands were not in a profitable state of occupancy, no such duties were exigible. To these pleas Lord Dundas answered, 1. That this was an action involving the legal effect and interpretation of a feudal grant, as to which the Court had exclusive jurisdiction; and 2. That the scatt, wattle, &c. were created debita fundi, by the titles, which could not be controlled by pre-existing usages. The Lord Ordinary decerned in terms of the libel, 'in respect the amount of the 'scatt and wattle duties is not disputed.' Mr Gifford having reclaimed, the Court repelled the objections to the jurisdiction; appointed mutual condescendences of the respective averments of the parties, 'concerning the use and wont of pay-'ing scatt and wattle, sheep and ox money, for 'ley and untenanted lands;' and thereafter remitted the case to the Jury Court. The parties then gave in a joint minute, stating that they respectively made these admissions; 1. That ley lands meant portions of arable land allowed to sward, and to be occupied as grass lands; 2. That where lands are laid ley at the will of the

occupier, and profit is derived from the occupancy, the scaat, wattle, &c. are exigible; 3. That when lands are ley from necessity, as the want of a tenant, and no profit is derived from the occupancy, these duties are not charged; and, 4. That Lord Dundas farmed out these duties to tacksmen, and that although these tacksmen may have given the proprietors deductions, yet Mr Gifford was not aware that these had been sanctioned by Lord Dundas. These facts having been agreed to be held as equivalent to a verdict, the Court adhered to the interlocutor of the Lord Ordinary.

J. Ker, W. S.—J. & C. Nairne, W. S.—Agents.

No. 681.

General Cumming and Spouse.—*Cockburn —Rutherfurd.*

Cumming's Trustees.—*T. H. Miller.*

Feb. 26. 1824.

First Division. Lord Meadowbank.

S.

Fiar and Liferenter—Bank Stock.—By disposition and deed of settlement in 1788, the late Mr Cumming conveyed his whole estates, real and personal, to trustees, inter alia to employ the residue, after payment of debts and legacies, for the use of his grandson, till he should arrive at majority, when they were to denude in his favour, under condition that he should not dispose of the same, nor alter the succession, either gratuitously or onerously; whom failing, without issue, before majority, and failing heirs-male of the truster's son's body, then to the heirs-female of the latter equally. By a codicil, however, he declared that the residue should pertain to the eldest heir-fe-

male exclusively, and without division, under the various conditions contained in his deed of settlement, and as should be thought proper by his trustees. The grandson, after attaining majority, died, but without requiring the trustees to denude; and thereafter Mrs Cumming acquired right to the residue, in terms of the codicil. Part of the estate consisted of about L. 11,000 of the capital stock of the Bank of Scotland, on which an extraordinary dividend or bonus of 20 per cent. had been declared. A question having arisen as to the right to this bonus, the trustees brought a multiplepoinding, and stated, that as Mrs Cumming's right was truly a liferent, they did not hold themselves safe to pay the money to her, in respect of the case of Rollo against Irving, in which it had been found by the House of Lords, that a liferenter had no right to such a bonus. To this it was answered, that Mrs Cumming was a limited fiar, and that as such she had right to the accumulated profits of which this bonus was composed. The Court, on the report of the Lord Ordinary, sustained her claim, and found her entitled to the bonus.

The Judges were of opinion that this case was different from that of Rollo, as Mrs Cumming was not a liferentrix; and it was observed by Lord Balgray, that he had been counsel in that case, which was an amicable suit; that all parties had been satisfied with the judgment of the Court of Session; but that, for the sake of security, it had been carried to the House of Lords, where it was unexpectedly reversed.

Trustees' Authority.—Rollo, Dec. 1, 1801, (No. 1. App. Life); Brander, 4 Vesey, 800.

G. Dunlop, W. S.—J. Home, W. S.—Agents.

A. Alexander and Others, Petitioners.— *H. J. Robertson.* No. 682.

Judicial Factor.—The late A. Alexander conveyed his property, and particularly two tacks, by a deed of settlement, in favour of trustees, for family purposes. The trustees having declined to act, and there being no one authorised to take charge of the estate, the petitioners, who were interested in it, applied for a factor, with power to carry the trust-deed into effect. The Court granted the prayer.

Feb. 27, 1824.

First Division. D.

Petitioners' Authority.—Bushby, Feb. 1, 1825, (ante, Vol. II. No. 160.)

M. N. Macdonald, W. S.—Agent.

A. Merchant and D. Brown, Advocators.— *Cockburn—Neaves.*
Tay Ferry Trustees, Respondents.—*Jeffrey—Moncreiff—Rutherfurd.* No. 683.

This case was connected with that noticed ante, Vol. II. No. 620. Besides the damages there claimed, Merchant and Brown also demanded reparation for the loss which they had sustained in 1821, by the trustees having removed several of the boats which formerly sailed from Woodhaven. And the question which here arose

Feb. 26, 1824.

First Division. Bill-Chamber. Lord M'Kenzie, D.

was, whether they had duly intimated this claim in terms of the statute. The Sheriff ordered a jury to be summoned, to assess those only which had been sustained subsequent to July 1822; and the Lord Ordinary refused a bill of advocation as incompetent, for reasons similar to those assigned in the case with Mr Stewart. But the Court, after advising a condescendence and answers, altered, and remitted with instructions, 'to summon a jury to assess the damages sustained by the advocators, in consequence of the operations of the trustees.'

J. & A. Smith, W. S.—A. Stonie, W. S.—*Agents.*

No. 684. Magistrates of Kilrenny, Suspenders.—*Solicitor-General Hope—H. Bruce.*
Andrew Johnston senior and junior, Charger.—*Cockburn—Rutherfurd.*

Feb. 26. 1824.
Second Division
Lord Cringletie.
F.

Suspension.—Johnstons raised action of declarator against the Magistrates of Kilrenny, concluding to have it found, that part of their lands and a certain road were not within the burgh of Kilrenny; but they subsequently abandoned their conclusion as to the road, and when the cause was remitted to the Jury Court, no issue was taken in reference to it. In the meantime, they applied to the Justices of Peace to have the road altered, in terms of the acts 1661, c. 41; and 1685, c. 39, who, after some procedure, to which the Magistrates of Kilrenny were parties, allowed the proposed alteration. Johnstons having com-

menced operations, the Magistrates brought a suspension and interdict, in which they did not complain of the decreet of the Justices, but simply craved to have the operations on the road prohibited, because the action regarding it was in dependence before the Jury Court. The Lord Ordinary, 'in respect that the proceedings com-'plained of were under the authority of the Jus-'tices of Peace, and that the present suspension 'does not complain of their decreet,' found the letters orderly proceeded, and the Court adhered.

J. Kerr, W. S.—A. Pearson, W. S.—Agents.

FERMIN DE TASTET & COMPANY, Pursuers.—*Dean of Faculty Cranstoun—Brown.*
J. M'QUEEN, Trustee of C. and A. HAMILTON and Co., Defender.—*Moncreiff—Christison.*
et e contra.

No. 685.

Feb. 26, 1824.

SECOND DIVISION
Lord Cringletie.
F.

Consignee — Commission Agent — Guarantee.— Hamilton and Company of Glasgow, being desirous to consign goods to Spanish America, entered into an arrangement with Fermin de Tastet and Company of London, through the intervention of one Bodan. By this, De Tastet and Company agreed to give their advice and assistance in the disposal of the cargo—to recommend a foreign house as agents for that purpose—to allow the goods to be entered in the name of Fermin de Tastet, for the facility of admission into the

foreign port, (he being a natural-born Spaniard) —to effect the insurances, &c. — and to make certain advances on the cargo. Hamilton and Company, on the other hand, agreed to allow a commission of 10 per cent. on the outward cargo, (five per cent. of which was to go to the foreign agents, two and a half to Bodan, and two and a half to De Tastet and Company); and to consign to them the return cargo, for selling which a commission was also to be allowed. The goods of Hamilton and Company, which consisted chiefly of ale and cyder, were, along with other adventures of a similar description, shipped at the port of Greenock, on board a vessel freighted by Bodan, in name of De Tastet and Company, but without directions to him to that effect. The bills of lading and invoices were made out in the name of Fermin de Tastet, and the vessel proceeded to Havannah, where the cargo was delivered to Yriarte and Lasa, the agents recommended by De Tastet and Company. They immediately intimated to De Tastet and Company, that the greater part of Hamilton and Company's ale and cyder had either burst the bottles, or was in unsaleable condition; and they subsequently remitted account sales of the remaining part which was marketable, the proceeds of which were not sufficient to pay the charges. De Tastet and Company, on hearing from Yriarte and Lasa, wrote to Bodan, announcing the failure of Hamilton and Company's shipments, and desiring him to intimate the same to them, which he did. No demand was made by Hamilton and Company for

surveys or certificates of the bad condition of their goods until two years after this, when De Tastet and Company having disposed of the returned cargo, demanded from Hamilton and Company payment of the balance still due them for their advances. This being refused, they raised action against Hamilton and Company, who, on the other hand, brought a counter action against them, (afterwards carried on by their trustee), concluding for payment of the invoice prices of the outward cargo, alleging that Bodan had acted as the agent of De Tastet and Company; that they were truly the consignees of the outward cargo, and as such, and also in consequence of the commission charged by them, were responsible for the foreign agents, who, it was said, had not properly accounted for the consignment; but they did not allege, that the agents recommended by De Tastet and Company were not reputed at that time trustworthy and solvent. The Lord Ordinary being satisfied, by the correspondence, that Bodan had not acted as the agent of De Tastet and Company, found, that the latter were not consignees, nor liable for the foreign agents; and that no blame was attachable to them, or to these agents, reserving, however, to Hamilton and Company's trustee to condescend on any objection to the correctness of De Tastet and Company's accounts; and the Court adhered.

The Court were unanimously of opinion, that De Tastet and Company were not truly consignees of the outward cargo; that the amount of commission

charged by them was not sufficient to make them responsible for the foreign agents, further than to guarantee that they were reputed solvent and trustworthy at the time; and that Hamilton and Company not having demanded surveys and certificates in proper time, could not now object to the want of them.

AINSLIE & MACALLAN, W. S.—J. CRAWFORD, W. S.—Agents.

No. 686. J. M'QUEEN, Trustee of A. & C. Hamilton and Co., Pursuer.—*Moncreiff—Christison.*
DE TASTET, LA COSTE & COMPANY, Defenders.—*Dean of Faculty Cranstoun—Brown.*

Feb. 26, 1824.

SECOND DIVISION
Lord Cringletie.
F.

Consignee — Commission Agent — Guarantee.—This was an action at the instance of Hamilton and Company against De Tastet, La Coste and Company, for payment of the invoice price of an adventure to Brazil, of an exactly similar description to that in the preceding case. The only difference was, that, in this case, the foreign agent recommended by the house of De Tastet, La Coste and Company, having died, it was found impossible to recover the proceeds of the goods consigned to him; but it not being alleged that he was not reputed solvent and trustworthy, and it appearing that De Tastet, La Coste and Company, had, at the same time, consigned to him goods of their own, the Court, on the report of the Lord Ordinary, assoilzied them.

AINSLIE & MACALLAN, W. S.—J. CRAWFORD, W. S.—Agents.

A. Bannatyne, Advocator.—*Murray—Shaw.*
Mrs Finlayson, Respondent.—*Cuninghame.*

No. 687.

Feb. 27, 1824.

First Division.
Lord Alloway.
S.

Assignation.—Bannatyne, the creditor of Lennox, who was tenant of a house belonging to Mrs Finlayson, executed a poinding of his effects; and to prevent a sequestration under her hypothec, he agreed to pay her the rent, on condition that she assigned her 'right of hypothec over the said effects to the extent of the sum for which I have become bound.' This having been agreed to, and after the effects were sold, Lennox having deserted possession, the agent of Bannatyne let the house, till the expiration of the lease, to another tenant. When the term arrived, this tenant refused to pay his rent, on which Bannatyne applied to the Sheriff of Lanarkshire for a sequestration. The tenant objected, that Bannatyne held no assignation from Mrs Finlayson, and the Sheriff sisted process till it should be produced. She declined to grant one, and the action was therefore dismissed. An action of damages having been brought against Bannatyne, he raised a process of relief against Mrs Finlayson, on the ground that she was bound to have granted the assignation. The Sheriff assoilzied her, in respect her obligation was limited to the effects of Lennox; and the Lord Ordinary, in an advocation, adhered to the absolvitor, in respect Bannatyne had a good title to sequestrate independent of the assignation, and Mrs Finlayson was enti-

tled to avoid involving herself in a dispute. The Court, by a majority, adhered; but found no expenses due.

Advocator's Authorities.—3. Ersk. 5, 11; Crawford, Jan. 21, 1727, (10531).
Respondent's Authority.—Christie, Dec. 14, 1814, (F. C.).

C. Fisher,—Greig & Peddie, W. S.—Agents.

No. 688.

Lieut. N. Anderson, Pursuer.—*Tawse.*
His Creditors, Defenders.—*Currie.*

Feb. 27, 1824.

First Division. S.

Cessio.—Anderson, a lieutenant in the army, on half pay, whose debts amounted to £. 570, and who had a wife and three daughters, was found entitled to the benefit of the cessio, on conveying £. 30 yearly, out of his half pay of £. 82, to his creditors.

The Court were induced to award this sum, in consequence of its being the amount which the pursuer, in an amicable arrangement with his creditors, had proposed to assign to them.

J. Hunter, W. S.—C. Gordon,—Agents.

SOLICITORS IN THE SUPREME COURTS, Pursuers.— *Solicitor-General Hope — Forsyth — Jeffrey — Sandford.*
WRITERS TO THE SIGNET, Defenders.— *Irving — Cockburn.*

No. 689.

Feb. 27. 1824.

FIRST DIVISION.
Lord Alloway. D.

Jurisdiction.—In 1820, the Court, on the application of the Faculty of Advocates and Writers to the Signet, allotted to them respectively certain seats in the area of the two Court rooms, and authorised them to appoint servants to exclude intruders. These two bodies accordingly took possession of the seats, and stationed servants to prevent admission to any one except members in their gowns. Instead of applying to the Court for accommodation, the Solicitors brought an ordinary action against the Faculty and the Writers to the Signet, stating, that, as agents and individuals, they had right to free entry to the several Court rooms, in order to attend to causes in which they were engaged, and to derive instruction from the proceedings which took place; that the Faculty of Advocates and Writers to the Signet had thought fit to exclude them from certain seats, and to appoint servants for that purpose; that this was not only injurious to them professionally, but was an encroachment on their rights and privileges—was insulting and degrading to them—created an invidious and unfounded distinction—and was a violation of the statute, 12th June 1693. They, therefore, concluded, that they had an equal right with any other class

of practitioners to occupy, during the deliberations of the Court, all or any part of the area and of the seats and benches; that all obstructions to free access should be removed, and, particularly, that the servants should be discharged. The action was only persisted in against the Writers to the Signet, who pleaded, in defence, 1. That it was incompetent, because the seats had been allotted to them by a special order of Court, made under the authority, inherent in every court of justice, to regulate the procedure before them, and to fix the accommodation which the members of Court, practitioners, parties, and the public, are to enjoy; and that such an order could not be questioned by an ordinary action, but only by a direct application to the Court itself; 2. That, even were the action competent, the regulation was legal and proper, was attended with no injustice to the Solicitors, and was consistent with those privileges which they, as Writers to the Signet, and as members of the College of Justice, had enjoyed from the institution of the Court. The Lord Ordinary having reported the action, the Court dismissed it as incompetent.

Pursuers' Authorities.—A. S. p. 58, (Sir I. Camp. Ed.); A. S. Jan. 29, 1642; Feb. 8, 1662; June 22, 1665; Nov. 5, 1671; Feb. 3, 1685; Dec. 16, 1686; Nov. 6, 1690; Stat. 1693, c. 27.

Defenders' Authorities.—A. S. Feb. 12, 1754; June 12, 1760.

D. Bisher,—Mackenzie & Sharpe, W. S.—Agents.

T. BARRETT, Pursuer.—*Forbes—Shaw-Stewart.* No. 690.
J. LOW, Defender.—*Buchanan—Robertson.*

This was a question whether the defender was owing an arrear of rent. The Lord Ordinary remitted to an accountant, and thereafter assoilzied the defender, with expenses. The Court adhered in part, altered quoad ultra, and found no expenses due.

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FIRST DIVISION. Lord Meadowbank. D.

MACKENZIE & SHARPE, W. S.—J. R. STODDART, W. S.—Agents.

J. SMITH, Suspender.—*More.* No. 691.
R. TAYLOR, Charger.—*Solicitor-General Hope—Brown.*

Bill of Exchange.—Smith was in use of accommodating Nisbet with blank bill stamps signed by him. One of these Nisbet delivered to Taylor, for the purpose of retiring his acceptance to Taylor, for £.50, then lying due at the Commercial Bank. The stamp was filled up by Taylor, in Nisbet's presence, for £.86, the former signing as drawer, and Nisbet as co-acceptor with Smith. Taylor then indorsed the bill so filled up, to the bank, in payment of Nisbet's acceptance of £.50, and delivered to Nisbet the balance of £.36. Nisbet having become bankrupt, Taylor retired the bill, and charged Smith for payment. He brought a suspension, on the grounds, 1. That Taylor having filled up and signed the blank bill

Feb. 27, 1824.

SECOND DIVISION. Lord Pitmilly. B.

as drawer, and being in the knowledge that it was granted for the accommodation of Nisbet, must be held to have come exactly into his place, and consequently was not entitled to the privileges of an onerous holder, who had acquired the bill after it was filled up; and, 2. That the bill was null as a blank writ, under the act 1696, c. 25. It was answered for Taylor, that though he was in form the drawer of the bill, he had truly advanced value for it, and was therefore the creditor in the bill, and entitled to the privileges of an onerous holder; and, 2. That the act 1696 did not apply to bills of exchange. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.

The Court were of opinion, that if a holder had truly given value for a skeleton bill, it was of no consequence whether he appeared on it in the character of drawer or indorsee.

Suspender's Authority.—Philip, February 21, 1809, (F. C.)
Charger's Authorities.—(1.)—Chitty, 70, 219; 1. Bell, 303; Smith v. Knox, 3. Esp. 47;—(2.)—1. Bell, 304; Little & Co. v. Muir, Feb. 23, 1803; (2. Bell, 251, Note 2, 5d edit.)

J. Gibson junior, W. S.—W. & A. G. Ellis, W. S.—Agents.

No. 692.

Feb. 27, 1824.

SecondDivision
Lord Cringletie.

D. Macra, Pursuer.—*Buchanan.*
T. M'Kenzie, Defender.—*Matheson.*

Process.—In an action by Macra against Mackenzie, the Lord Ordinary pronounced an inter-

B.

locutor, (7th March 1823,) assoilzieing the latter. Against this interlocutor, a representation was given in for Macra, which was not subscribed by counsel. The Lord Ordinary refused to write on it, further than to mark, 'Wont stop 'finality—not subscribed.' His Lordship thereafter, (June 14, 1823,) granted leave to Macra to apply to the Court, under the 48th Geo. III., to be reponed, on payment of the previous expenses. Macra, instead of doing so, presented a petition, (January 12, 1824,) praying for a remit to the Lord Ordinary, to receive the representation, without subjecting him in the previous expenses. The Court remitted to his Lordship to receive the representation, 'reserving all claim 'for expenses till the issue of the cause.'

The Court were of opinion, that an opportunity should have been given to counsel to subscribe the representation, after it had been inadvertently lodged without his signature, and that the case did not fall under the 48th Geo. III.

Defender's Authorities.—A. S. March 5, 1789; Anderson, Nov. 15, 1822, (ante, Vol. II. No. 17.)

J. Pedie, W. S.—T. Mackenzie, W. S.—Agents.

No. 693. JOHN WALLACE and Others, Pursuers.—*Solicitor-General Hope—Forsyth.*
MAGISTRATES OF ST ANDREW'S, Defenders.—*Cockburn—Buchanan.*

Feb. 27, 1824.
SECOND DIVISION
Lord Cringletie.
F.

Burgh—Church Patronage.—In 1689, a second ministerial charge was created in the burgh Church of St Andrew's, by the burgh, with concurrence of the University and the landward part of the parish. It was supported partly by a stipend paid by the burgh, and partly by a portion of the revenues of the archdeaconry of St Andrew's, granted by the Crown for that purpose in 1699; but the right of patronage had always been exercised by the Magistrates. In 1817, the Magistrates having sold the patronage by private bargain, for the purpose of obtaining money to repair the harbour, Wallace and others, the Convener and Deacons of the trades of the burgh, brought a reduction of the sale, on the grounds, 1. That the patronage of the church of a burgh was sua natura not alienable by the Magistrates; 2. That it fell under the prohibition of the act 1587, c. 112, to sell 'the free-'dome and privelege' of the burgh, without consent of the King and Estates of Parliament; 3. That there was no necessity for the sale, as it was admitted that the burgh had other disposeable property; and, 4. That, at all events, it ought to have been sold by public roup. The Lord Ordinary found, 'that a right of patronage is a sub-'ject of commerce;' and, 'that as the right of

'presenting the second minister of St Andrew's 'belonged to the community thereof, and was ex- 'ercised by the Magistrates as representing the 'community, it was competent to them to sell 'the same; and it not being denied that the sale 'was repeatedly advertised, nor asserted that the 'price of £.800 was an undervalue, that the sale 'is valid to the purchaser,' and he accordingly assoilzied the defenders. But the Court altered, and, in respect that the sale was ultra vires of the Magistrates, reduced in terms of the libel.

The majority of the Court were of opinion, that the right vested in the Magistrates of burghs of presenting to churches, seats in universities, &c. in their own burghs, is a privilege which they have no power to alienate; and that this right was in quite a different situation from the patronage of an unconnected parish, which the burgh may have acquired. Lord Glenlee, however, held, that the Magistrates had the power to sell the patronage; but that there was no such necessity as to warrant their having done so in the present case; and all of their Lordships concurred in holding, that the circumstance of the sale having been by private bargain, was not of itself sufficient to render it null. Lord Pitmilly, as an heritor in the parish, declined voting.

Pursuers' Authorities.—Town of Wigton, Jan. 6, 1681, and cases in Dict. i. 157; Turnbull, &c. Jan. 26, 1812, (F. C.); Magistrates of Paisley, Jan. 22, 1822, (ante, Vol. I. No. 301.)

Defenders' Authorities.—M'Ghie, Dec. 15, 1755, (2501); Deans, July 4, 1752, (2522); Wilson, Feb. 21, 1775, (2529.)

R. Thomson,—W. Gardner, W. S.—Agents.

No. 694. W. JACK, Petitioner.—*Solicitor-General Hope.*
P. PEARSON, Respondent.—*Fullerton.*

Feb. 28, 1824.
FIRST DIVISION.
H.

Interim Execution.—The case, ante, Vol. II. No. 651, having been appealed, the Court allowed interim execution for payment of expenses in common form.

T. WALKER,—RAMSAY & IMRIE,—Agents.

No. 695. J. BOAZ.—*Solicitor-General Hope—Cuninghame.*
J. WATSON.—*Greenshields—Cockburn.*
Competing.

Feb. 28, 1824.
SECOND DIVISION
B.

Sequestration.—In a competition between Boaz and Watson for the trusteeship on Muir's sequestrated estate, the Court remitted to the Sheriff of Lanarkshire, who reported that Boaz had been duly elected. Watson objected to the report, in so far as it sustained the vote of M'Donnell, W. S., (on which the fate of the election depended), on the ground, 1. That in his affidavit he had failed to value and deduct a right of hypothec which, as an agent, he held over the title-deeds of the bankrupt; 2. That for a law-account, which formed part of his claim, one Lawrie was jointly liable, and that he ought to have valued his responsibility as a separate security; and, 3. That the oath did not bear that the debt had not been paid or compensated. It was answered for Boaz, 1. That M'Donnell had made oath that he possessed no title-deeds belonging to the bankrupt, and that if he did, he

was not bound to use or value his right of hypothec; 2. That if Lawrie was jointly liable, which was denied, a mere right to sue is not a separate security; and, 3. That the oath bore the debt to be still due, which necessarily inferred that it was neither paid nor compensated. The Court repelled the objections, confirmed Boaz, and found Watson liable in expenses *.

J. M'Donnell, W. S.—F. Snodgrass, W. S.—Agents.

J. Boaz, Complainer.—*Solicitor-General Hope—Cuninghame.*
J. Watson and J. Tod, Respondents.—*Greenshields—Cockburn.*

No. 696.

Feb. 28, 1824.

Second Division

B.

Process—Expenses.—In the course of the proceedings before the Sheriff in the preceding case, Boaz applied to him for warrant to force back from Watson, and Tod his agent, the papers in the competition, of which they had got possession, and he presented to the Court a petition and complaint against them for the same purpose. The Court at once dismissed the complaint, superseding as to expenses, in which they now found Boaz liable.

The Court considered it improper to call upon them to interfere to compel obedience to the order of the

* *Process.*—Watson having intimated his intention to reclaim, the Court granted interim warrant to extract the decree in order to be recorded, reserving his right to do so.

Sheriff, which he had sufficient power, and had taken the necessary steps to enforce.

J. M'DONNELL, W. S.—F. SNODGRASS, W. S.—Agents.

No. 697.

T. WILSON, Complainer.—*Wilson.*
T. THOMSON and Others, Respondents.—*Skene—Maidment.*

Feb. 28, 1824.

SECOND DIVISION M'K.

Process—Bill-Chamber.—Wilson presented a bill of suspension of a charge given by Thomson on a bill of exchange, which the Lord Ordinary refused. Thomson, without taking out a certificate of refusal, put the diligence in force, and apprehended Wilson, who, to obtain his immediate release, granted two bills to retire the bill charged on, and another, also in Thomson's hands. He thereon presented a complaint to the Court against Thomson and his agent, praying for restitution of the bill, and for punishment. It was contended for the respondents, that after a bill of suspension has been refused, it is competent to proceed with the diligence, without taking out a certificate of refusal; but the Court sustained the complaint, and found, 'that the conduct of the 'respondents, in so far as they proceeded with 'diligence against the complainer, and even 'caused apprehend his person, upon the refusal 'of his bill of suspension, without obtaining from 'the Clerks of the Bills a certificate of such re-'fusal, was illegal and highly unwarrantable, and 'contrary to established practice;' and they ordained one of the bills to be delivered up, the other

having been indorsed away by Thomson, and paid by Wilson on his bill of suspension having been finally refused, on a reference to the charger's oath.

Complainer's Authorities.—4. Ersk. 1, 9; 2. Ivory, 248; M'Lachlan, Dec. 15, 1821, (ante, Vol. I. No. 217.)

N. GRANT,—R. PITCAIRN, W. S.—Agents.

J. GLEN, Advocator.—*Gillies.*
D. M'KENZIE, Respondent.—*Solicitor-General Hope—Handyside.*

No. 698.

Feb. 28, 1824

SECOND DIVISION
Bill-Chamber.
Lord Eldin.
M'K.

Landlord and Tenant.—Glen was subtenant of a mill, and his lease having been allowed to expire without being warned to remove, an action of irritancy and removal, under the A. S. Dec. 14, 1756, was brought against him before the Sheriff of Lanark, by M'Kenzie, manager of the Glasgow Delftfield Company, the principal tenants, as being two years' rents in arrear. In defence Glen alleged, that he was not only not in arrear of rents, but that he had a large claim against the principal tenants, in virtue of certain stipulations in his lease; and he craved a diligence to recover accounts and vouchers, which were in the hands of one Hogg, (who had formerly been his partner,) in support of his averments. The Sheriff having decerned in the removing, Glen presented a bill of advocation. The Lord Ordinary remitted to the Sheriff to recall his interlocutor; to allow the

advocator a proof of his allegations; and grant the diligence craved. And the Court adhered.

W. WILLIAMSON,—J. ROBERTSON, W. S.—Agents.

No. 699. WRITERS TO THE SIGNET, Petitioners.—*Solicitor-General Hope—Dean of Faculty Cranstoun—Moncreiff.*
J. GRAHAM, W. S. Respondent.—*Forsyth—Jeffrey—Sandford.*

March 2, 1824.

FIRST DIVISION. Bill-Chamber. Lord M'Kenzie.

Interim Execution—Process.—By a judgment of the Court (see ante, Vol. II. No. 192.) it was found, in an action of declarator, that the Society of Writers to the Signet had power to suspend Graham, W. S. from his office, or deprive him of it in the event of violating their regulations. Against this he entered an appeal; and the Society, alleging that he continued to infringe their rules, presented a bill of suspension and interdict, praying that he should be prohibited from doing so in future. This was objected to as incompetent, because it was an indirect and irregular mode of applying for interim execution. The Lord Ordinary, on advising with the Court, having refused the bill, the Society reclaimed, and presented a petition, praying for interim execution, to the effect of preventing Graham from violating their rules; and in the event that he should do so, to authorise them to suspend him from, or deprive him of his office. The Court, in the suspension, adhered *; but ordered a report as to the num-

* By a mistake this decision was reported, ante, Vol. II. No. 437.

ber of Signet-letters presented at the office from the 1st of March 1823, and the proportion thereof signed by Graham, from which it appeared, that out of 17,797, there were 1636 subscribed by him. The Court, after ordaining him to give in a list, under his hand, of the apprentices and clerks whom he alleged to be bona fide employed by him in the regular discharge of his business, prohibited and discharged him from subscribing Signet-letters written by any other person than those who were bona fide his clerks or apprentices, and agreeably to the regulations established by the Society.

Mackenzie & Sharpe, W. S.—D. Fisher, Agents.

W. Stirling, Pursuer.—*Solicitor-General Hope —Forsyth.*

Sir W. Honyman, Defender.—*Baird.*

No. 700.

March 2, 1824.

Second Division
Lord Pitmilly.
F.

Damages.—In 1791, Sir Walter Stirling disponed to Sir William Honyman certain superiorities, to enable him to make up a freehold qualification in the county of Lanark. The price was not settled at the time; and when, in 1794, £.326 was demanded, Sir William wrote, 'I never could have thought of purchasing on the 'terms you propose in your letter. I shall either 'make a reconveyance, or cancel the disposition, 'as you incline.' To which it was answered, 'The 'superiority shall be settled as most agreeable to 'you.' No further correspondence passed on the subject, and Sir Walter continued to draw the feu-duties as superior, till 1814, when he disponed

them, along with certain other superiorities, to his nephew, the pursuer. Soon after the correspondence in 1794, Sir William Honyman expede a charter on Sir Walter's disposition to him, took infeftment, and was enrolled as a freeholder; and on the pursuer's claiming to be enrolled at the general election in 1818, his claim was rejected, on the ground of Sir William's enrollment. The pursuer then raised action against Sir William, concluding for reduction of his titles, or reconveyance of the superiorities, and also for damages, for the loss of his vote at the election. Sir William pleaded in defence, that he had paid the price of the superiorities in 1797, and he appealed, in proof of this, to certain alleged markings in his own books, which were not demanded to be produced, and to a similar marking of his own in an old almanack. The Lord Ordinary, being satisfied that there was no legal proof of payment, decerned against Sir William, in terms of the conclusion for reconveyance, but assoilzied him from the claim of damages, and found no expenses due. The pursuer reclaimed, but the Court adhered.

J. Swan, W. S.—Dallas & Innes, W. S.—Agents.

No. 701.

W. Gibson, Suspender.—*Hutcheson.*
Mrs Janet Moffat, Charger.—*Jardine.*

March 2, 1824.

Second Division
Lord Pitmilly.
F.

Landlord and Tenant.—The late William Moffat, (the charger's father), let to William Urban tenement for 38 years, by a lease which ex-

cluded assignees and subtenants, and bound the tenant to keep in repair 'the wright work, pa-'pering, and painting.' Welsh subset the premises to Gibson, for the whole period of the lease, in virtue of a consent indorsed on the original tack, by which Moffat bound himself 'to 'ratify and concur in any proper sublease to be 'granted by Welsh, his heirs, &c.; the said 'James Welsh, and his foresaids, and their sub-'tenants, being jointly liable to me for the rent 'within stipulated.' At the issue of the tack, Mrs Moffat raised action before the Sheriff against Gibson, to have him ordained to put the subjects in proper repair. The Sheriff, on the report of tradesmen, having decerned against him for £.43, he brought a suspension on various special grounds; but the Lord Ordinary found the letters orderly proceeded, and the Court adhered.

GEO. MILL,—J. KENNEDY junior, W. S.—Agents.

D. WILLIAMSON and Others, (SHAW's Trustees.)—*Gillies.*
N. WILLIAMSON and Others.—*Currie.*
Competing.

No. 702.

March 4, 1824.

FIRST DIVISION.
Lord Alloway.

This was a question between the trustees of a deceased person and the residuary legatees, which resolved into a count and reckoning. The Lord Ordinary approved of an accountant's report to a certain extent; and the Court adhered.

T. THORBURN,—JOHNSTONE & LITTLE,—Agents.

No. 708. DICKSONS BROTHERS, Suspenders.—*More—Hamilton.*

J. KERR and Others, (ROCHEID's Trustees,) Chargers.—*Baird—Handyside.*

March 4, 1824.

FIRST DIVISION. Lord Meadowbank. D.

Lease.—Rocheid let a stripe of ground to Dicksons Brothers, absolutely for thirty years, and another, by a separate lease, for the same period, with a power of resuming possession at any time, on paying damages. The object of this reservation was to enable him to feu for building; but this was not expressed in the tack. Dicksons Brothers afterwards raised separate suspensions of charges for the rents, alleging that Rocheid had not performed the obligations incumbent on him. The Lord Ordinary conjoined them, found that the first lease was accepted on condition of the other, that it was to continue till the ground was feued, and remitted to a man of skill to examine whether the landlord had performed his obligations. But the Court disjoined them, found that the leases were separate, and that the latter might be terminated at pleasure, and adhered quoad ultra.

J. CAMPBELL jun. W. S.—J. KERR, W. S.—Agents.

J. Peock, Pursuer.—*Baird.* No. 704.
R. Glasgow, Defender.—*Ferguson.*

March 4, 1824.

Second Division
Lord Pitmilly.

Title to pursue.—Peock raised an action against Glasgow for the price or hire of three negroes, the property of Peock's son, who had died in the island of St Vincent's, leaving a will, by which he bequeathed his property to his father, and appointed certain persons in the island his executors. The chief defence was, that Peock not being his son's executor, he was not entitled to pursue. The Lord Ordinary assoilzied Glasgow, 'reserving to the pursuer his claims against the executors of his deceased son,' and the Court adhered.

F. Fraser,—P. Wishart, W. S.—Agents.

Magistrates of Inverness.—*Dean of Faculty Cranstoun—Cuninghame.* No. 705.
J. J. M'Intosh.—*Fullerton—Tytler.*
C. M'Intosh.—*Jeffrey—Buchanan.*
Competing.

March 4, 1824.

Second Division
Lord Cringletie,
F.

This was a question relative to the import of certain provisions, in a bequest by the late Captain William M'Intosh to the Magistrates of Inverness, as trustees, for the purpose of establishing an academy for the education of boys of the name of M'Intosh, to be taken from certain families in a specified order. It was settled by a

special interlocutor, which contained no general point.

T. M'KENZIE, W. S.—J. S. M'INTOSH, W. S.—D. M'INTOSH, W. S.—Agents.

No. 706.

W. WHITE, Petitioner.—*Cockburn.*
R. BALLANTINE, Respondent.—*Mathson.*

March 5, 1824.

FIRST DIVISION.
H.

Inhibition.—In 1814, Ballantine executed an inhibition against White, on a decree of absolvitor of this Court, with expenses; but which was reversed by the House of Lords in 1823. He had also raised a similar diligence on a petitory action, from which the Lord Ordinary assoilzied White. Ballantine having refused to consent that the inhibitions should be cleared off, unless a counter inhibition on a depending action were recalled, White applied to the Court for a warrant to mark them as extinguished. To this it was objected, 1. That a summary application was incompetent at this distance of time; and, 2. That the decrees were of themselves sufficient warrants for clearing off the inhibitions. The Court recalled them, and found Ballantine liable in expenses.

W. DOUGLAS, W. S.—T. CRAMTOUR, W. S.—Agents.

J. GEDDES, Pursuer.—*Forsyth.* No. 707.
A. WALLACE and Others, Defenders.—
Cuninghame.

March 5, 1824.

FIRST DIVISION.
Lord Meadowbank.

The question here related to the interpretation of a judgment of the House of Lords, pronounced in an action of accounting, which had depended for thirty years. The Lord Ordinary approved of the report of an accountant as to the application of the judgment; but the Court altered, and remitted with new instructions.

H.

W. DRYSDALE, W. S.—J. G. HOPKIRK, W. S.—Agents.

T. MUCKARSIE, Complainer.—*Robertson.* No. 708.
J. WILLIAMSON and Others, Respondents.—
Cheape.

March 5, 1824.

SECOND DIVISION
B.

Inhibition.—Muckarsie, as mandatary of George Williamson, residing in Virginia, instituted an action of reduction of a deed of settlement executed by Williamson's father, ex capite lecti, in which decree was obtained. The respondents afterwards brought a reduction reductive, in which they called Muckarsie, as a defender, along with his constituent. The case having been remitted to the Jury Court, a verdict was returned, finding that the granter of the deed had not been on deathbed at the period of execution. Muckarsie immediately on this intimated his intention of paying the respondents their expenses, which, however, could not be ascertained, nor found due, till the verdict was applied in the Court of Ses-

sion. Notwithstanding this, the respondents raised inhibition against Muckarsie, and refused to discharge it, although he consigned a sum in the Commercial Bank to meet the expenses when found due. Muckarsie then presented a complaint to the Court, praying for recall of the inhibition, on the ground, that, as mandatary for a defender, he was not personally liable for expenses; and that, at any rate, it was improper to inhibit him after his agreeing to pay the expenses. It was answered, that the defender in a reduction reductive is in reality a pursuer, though a defender in form. The Court recalled the inhibition, and found the respondents liable in expenses.

The Court proceeded chiefly on the ground, that the inhibition was nimious after the offers of payment by Muckarsie; and the majority held, that he was to be considered as mandatary for a defender, not for a pursuer; but it was agreed by their Lordships, that a defender's mandatary may so conduct himself as to make himself personally liable for expenses.

A. BURNS, W. S.—W. WALKER, W. S.—Agents.

No. 709. MRS E. RYMER and Others, Advocators.—*More.* P. BAXTER, (HUTTON's Trustee,) Respondent.—*Jameson.*

March 5, 1824.

SECOND DIVISION. Bill-Chamber. Lord Pitmilly.

Title to pursue — Sequestration of Rents. — In 1795, the late John Hutton obtained decree of adjudication of certain heritable subjects, the property of the late Walter Rymer, and drew the rents for several years. In 1816, he conveyed to

Baxter, in trust for behoof of his creditors, certain specified heritable property, and all his 'move-'able estate, debts, and effects of whatever de-'scription.' On the death of Walter Rymer, the advocators, his sisters, were allowed to enter into possession of the heritable property over which Hutton's adjudication extended, and they subsequently made up titles as heirs of their brother. On Hutton's death, in 1822, Baxter applied to the Sheriff of Fife to interdict the advocators from receiving the rents of the adjudged subjects, and the tenants from paying to them. The Sheriff having granted the interdict, and sequestrated the rents, a bill of advocation was presented, on the grounds, 1. That Baxter had no title to the adjudication, which was not conveyed by Hutton's trust-deed; and, 2. That it was incompetent for the Sheriff to sequestrate the rents of heritable property, or to alter the state of feudal possession. The Lord Ordinary refused the bill; but the Court altered, and remitted to the Sheriff to recall the sequestration and interdict in hoc statu.

Advocators' Authorities.—(1.)—Ros, March 2, 1770, (5019); Waddell, Feb. 13, 1789, (5022).—(2.)—2. Erak. 12, 55.

D. Thomson jun.—W. S.—T. Scotland, W. S.—Agents.

John Henry, Pursuer.—*Jameson.*
James Henry, Defender.—*Menzies.*

No. 710.

March 5, 1824.

Second Division
Lord Pitmilly.
B.

This was an action of reduction of a decreet of adjudication, in which the Lord Ordinary assoilzied the defender; and the Court adhered.

Campbell & Clason, W. S.—T. Baillie,—Agents.

No. 711. J. Cairncross, Advocator.—*Skene—Sandford—J. Henderson junior.*
W. Mitchell, Respondent.—*Jameson—Neaves.*

March 6. 1824.
First Division. Lord Alloway. H.

Bill of Exchange.—Cairncross, as indorsee of a bill accepted by Mitchell, raised an action against him, before the Magistrates of Dundee, stating that it had been discounted five years previously with a bank of which he was teller, and that, having been dishonoured, he had, at the request of Mitchell, retired it. Mitchell alleged that he had paid the bill, which he had inadvertently allowed to remain in the hands of Cairncross. The Magistrates assoilzied him, in respect Cairncross did not offer to prove his allegation, by the writ or oath of Mitchell. But in an advocation, the Lord Ordinary, in respect Cairncross must be presumed to be an onerous holder, decerned against Mitchell; and the Court, after ordaining the parties, in the very special circumstances of the case, to be judicially examined, adhered.

N. W. Robertson,—A. Duncan,—Agents.

No. 712. J. Pedie, W. S., Petitioner.—*Shaw.*
A. Grant, Respondent.—*Matheson.*

March 6, 1824.
First Division. D.

Execution pending Appeal.—Decree awarding interim execution as to expenses, pending appeal of the case, ante, Vol. I. No. 544.

J. Pedie, W. S.— —Agents.

CAPTAIN M'KENZIE and GENERAL SHAW, Suspenders.—*Moncreiff—Murray.*
D. M'KENZIE, Charger.—*Robertson.*

No. 713.

March 6, 1824.

SECOND DIVISION
Bill-Chamber.
Lord Balmatyne.
F.

Tailzie—Power to cut Woods.—Mr M'Kenzie possessed the estate of Newhall, in the county of Ross, under an entail which contained no prohibition as to cutting wood. For the purpose of liquidating his debt, he advertised a sale of the whole woods on the estate, without any expressed reservation. Capt. M'Kenzie and Gen. Shaw, substitute heirs of entail, having presented a bill of suspension and interdict, the Lord Ordinary granted the interdict, and passed the bill, 'to the effect of its 'being fixed what parts of the woods can be cut 'in consistency with the just interest of the substitute heirs.' Mr M'Kenzie reclaimed, and the Court, on a minute having been given in by him, agreeing 'that no wood shall be cut down which 'is not ripe and fit for sale, and that the ornamental timber necessary for the amenity of the mansion-house shall be allowed to stand,' of consent recalled the interdict, and allowed the wood to be cut in terms of the minute, under the inspection of two persons appointed by each party.

The Court were satisfied, that an heir of entail is not entitled to cut young and unripe wood, though planted by himself, as was the case here; and that in a strong case of injury, likely to be done to the comfort of the mansion-house, the Court would interfere; but that

it requires an extreme case to warrant the interference of the Court.

Suspender's Authority.—Gordon, January 24, 1811, (F. C.)
Charger's Authorities.—Lord Cathcart, Jan. 31, 1755, (15309); Hamilton, Feb. 16, 1757, (15408); Stewart, June 25, 1761, (9436); 1 Bell, 40.

J. ANDERSON, W. S.—J. GIBSON-CRAIG, W. S.—Agents.

No. 714. L. HILL and Others, Advocators.—*Jardine.*
J. BURNS, Respondent.—*Baird.*

March 6, 1824.

SECOND DIVISION Bill-Chamber. Lord Eldin. B.

Expenses—Summary Application.—An act of Parliament was obtained, in 1816, for making a new road between Glasgow and Carlisle, the line of which passed through part of Burns' property. In order to afford immediate occupation to the manufacturing population, in 1819, then without employment, an agreement was entered into between the road trustees and Burns, by which the latter agreed to allow operations to be commenced without insisting on a compliance with the provisions of the statute, the trustees agreeing to pay a certain sum for the ground, and to refer to arbiters the amount of damages; and the surveyor thereafter, in August 1820, granted Burns an obligation 'to pay the money in three 'months, or as soon as the arbiters gave their 'opinion.' Notwithstanding this, Burns, a few days after the date of this obligation, applied to the Sheriff for an interdict to stop the further

operations on the road, until the damages were paid, agreeably to the provisions of the act of parliament. The Sheriff granted the interdict, which was not removed till the damages were ascertained and paid; and he thereafter found Burns entitled to his expenses. A bill of advocation, as to the award of expenses, having been presented by the clerk and surveyors of the road, the Lord Ordinary, 'in respect the respondent's application to the Sheriff was unwarrantable and unnecessary,' remitted to him to recall his interlocutor finding expenses due, and his Lordship found Burns liable in expenses of the advocation. The Court adhered.

A. Connell, W.S.—Carnegie & Shepherd, W.S.—Agents.

A. & W. Hume, Suspenders.—*More.*
Colonel Allen, Charger.—*Neaves.*

No. 715.

March 6, 1824.

Second Division
Bill-Chamber.
Lord Eldin.
M'K.

Landlord and Tenant.—The Sheriff of Perthshire having decerned against A. & W. Hume, as tenants of a farm of Colonel Allen's, for payment of a sum to put the houses in repair, they presented a bill of suspension on various allegations, which were disputed by Colonel Allen. The Lord Ordinary and the Court, considering that these had not been sufficiently investigated in the inferior court, remitted to the Sheriff to recall his interlocutor, and hear parties further on their several averments, and with power to award

the expenses incurred in this Court as he should see cause.

A. Gifford,—A. Pearson, W. S.—Agents.

No. 716. H. Gilchrist, Petitioner.—*Gillies.*
A. Ewing, Respondent.—*Moncreiff—Shaw.*

March 6, 1824. Second Division M'K.

Bankrupt.—Gilchrist, a bankrupt under sequestration, having applied for a discharge, Ewing opposed it on various grounds, and particularly, that there was not the legitimate concurrence. But the Court, being satisfied that the objections were unfounded, granted the discharge.

G. Dunlop, W. S.—Campbell & Mack, W. S.—Agents.

No. 717. A. Mein.—*Moncreiff—Ivory.*
G. Sanders.—*Cockburn.*
Competing.

March 6. 1824. Second Division M'K.

Sequestration—Ranking.—On a remit by the Court in a competition for the trusteeship on the sequestrated estate of J. Landale and Company, the Sheriff of Lanarkshire reported that Mein had been duly elected. Sanders objected to the report, in so far as it sustained the vote of Stirling, Gordon and Company, who were ranked for £. 2644, on the ground that they had failed to deduct a partial payment by A. Landale, the father of one of the bankrupts. This gentleman had guaranteed to Stirling, Gordon & Co. 'regular

'payment of whatever goods John Landale and 'Company may be owing, or purchase from you, 'to the extent of £. 1000;' and he had paid this sum to them subsequently to the sequestration, and to the lodging of their claims. Sanders contended, that Stirling, Gordon and Company were bound to have deducted this payment; while it was maintained, on the part of Mein, that they were entitled to rank for their debt as it stood at the date of sequestration. The Court repelled the objections to the Sheriff's report, and confirmed Mein's election as trustee.

The Court considered this question settled by the case of Robertson *.

Mein's Authorities.—Borthwick, Jan. 29, 1819, (F. C.); Robertson, July 3, 1823, (ante, Vol. II. No. 430.)

GIBSON, CHRISTIE & WARDLAW, W. S.—J. YOUNG,—Agents.

* In the discussion before the Sheriff, in reference to other disputed claims, which were not brought under the consideration of the Court, a demand was made for a diligence to recover 'all 'vouchers, documents, letters, contracts, minutes, entries in 'books,' &c. concerning the debts in question. The Sheriff refused the diligence as craved, and reported his opinion, that he is only bound to grant a diligence for the recovery of 'any receipt, 'discharge, or voucher, which instantly destroys or disproves 'the debt in whole or in part,' but not to grant a sweeping diligence for the purpose of 'expiscating the constitution and 'ultimate validity of the debt, not only as to the fact but as to 'the law;' and he craved the opinion of the Court for his future guidance. Their Lordships unanimously approved of the Sheriff's opinion.

No. 718.

J. Mill, Pursuer.—*Hutchison.*
Col. Stratton, and Others, Defenders.—*Robertson.*

March 9, 1824.

First Division.
S.

Cessio.—Mill, examiner of the customs, Edinburgh, with a salary of £.330, brought a process of cessio, which was opposed by his creditors, on the allegation that he had not satisfactorily accounted for his effects. His debts amounted to about £.3600, and his funds, capable of being realized, were only £.118. The Court, after remitting to an accountant to inquire how far his losses had been occasioned by innocent misfortunes, decerned in the cessio, on his assigning £.200 per annum out of his salary till his debts were paid.

G. Mill,—J. S. Robertson, W. S.—Agents.

No. 719.

R. Mackenzie, W. S., Pursuer.
Mrs Johnston, Defender.—*Campbell.*

March 9, 1824.

First Division.
Lord Alloway.
D.

In this case, the Lord Ordinary found neither party entitled to expenses, and the Court refused petitions.

R. Mackenzie, W. S.—W. Dallas, W. S.—Agents.

No. 720.

H. Monteith, Advocator.—*Fullarton.*
S. Levy, Respondent.—*Cockburn.*

March 9, 1824.

Second Division
Bill-Chamber.
Lord Eldin.
F.

Process—Bill-Chamber—A. S. 14th June 1709.—Levy having been arrested on an action

against him before the Commissary-Court, at the instance of Morrison, the latter presented a bill of advocation, which was refused by the Lord Ordinary on the Bills on the 9th of August. On the 26th of November following, he presented a second bill, to which Levy objected, that when a bill has been refused during vacation, a second bill is competent only to the next succeeding Ordinary on the Bills. The Lord Ordinary repelled the objections to the competency, and passed the bill; but the Court recalled his Lordship's interlocutor, and remitted to refuse the bill as incompetent.

R. Crooks, W. S.—Greig & Pedie, W. S.—Agents.

THOMSONS & COMPANY'S TRUSTEES, Pursuers.— *Moncreiff—Hunter.*
CRAIG & HUNTER, Defenders.—*Skene—Brown.*

No. 721.

March 9, 1824.

SECOND DIVISION
Lord Pitmilly.
M'K.

Bill of Exchange.—Craig and Hunter accepted, without value, the drafts of Thomson, Gibson and Company, of which concern the late J. Thomson was a principal partner, to the extent of £.5000. Thomson, Gibson and Company indorsed these drafts to J. Thomson and Company, (the principal partner of which also was the late Mr Thomson), by whom they were indorsed to different bankers. Both these houses having become bankrupt, and Thomsons and Company having paid a dividend on the bills, their trustee raised action of relief against the acceptors, Craig and Hunter, who alleged, in defence, that the bills had been granted for the accommodation of Thomsons and Com-

pany, as well as of Thomson, Gibson and Company; but the Lord Ordinary found, 'that they had failed to establish their averments,' and decerned against them in terms of the libel, and the Court adhered.

GIBSON & OLIPHANT, W. S.—CAMPBELL & MACK, W. S.—Agents.

No. 722. J. DICKSON and Others, Petitioners.—*Forsyth.*
LADY M. L. CRAWFORD, Respondent.—*Alison.*

March 10, 1824. FIRST DIVISION. H. *Execution pending Appeal.*—Decree allowing interim execution pending the appeal of the case, ante, Vol. II. No. 631.

D. FISHER,—G. LYON,—Agents.

No. 723. J. WATSON,—*Robertson.*
J. LIVINGSTONE.—*More.*
Competing.

March 10, 1824. FIRST DIVISION. S. *Competition—Bankrupt—Bill of Exchange.*—In a competition for the office of trustee on the sequestrated estate of J. M'Neil and Company, between Watson and Livingstone, the fate of it depended on an objection taken by Watson to a vote by Cochrane and Company, in favour of Livingstone. The nature of it was this: Guthrie and Sons granted promissory-notes to M'Neil and Company, who indorsed them to Cochrane and Company. Guthrie and Sons becoming insolvent before the bills were due, entered into a composition-contract with their creditors, to which Cochrane and Company, with the concurrence of M'Neil and Company, acceded. When the notes fell due, they were not protested, and the estates of M'Neil

and Company having been sequestrated, Cochrane and Company claimed to vote at the election of the trustee. To this Watson objected, that as the notes had not been duly negotiated against M'Neil and Company, the indorsers, the vote was inadmissible. The answer to this was, 1. That by the arrangement under the composition-contract, the necessity of due negotiation had been waved; and, 2. That it was sufficient to produce the notes, because it was not requisite to show evidence of negotiation, as an allegation of its having been neglected was merely a defence which a claimant was not bound to anticipate. The Court sustained the vote, and preferred Livingstone.

Watson's Authority.—1. Bell, 254.
Livingstone's Authorities.—1. Bell, 332; 2. Bell, 378.

J. S. HALL, W. S.—T. GRAHAM, W. S.—Agents.

MRS CRANSTOUN and Others, Pursuers.—*Murray—Sandford.* No. 724.
W. SCOTT, Defender.—*Cockburn—Boswell.*

March 10, 1824.

FIRST DIVISION. Lord Succoth. S.

Judicial Factor — Retention. — Cranstoun and others having brought an action of accounting against Scott, a judicial factor, the Lord Ordinary, on the report of an accountant, pronounced an interim decree against him. He reclaimed, and contended, that he was entitled either to retention of that sum in security, or to caution for his eventual claim to the expenses of process, 1. Because the expenses formed part of his management as factor; and, 2. Because the expense of his exoneration was part of the expenses of the trust.

To this it was answered, 1. That he had not complied with the requisites of the A. S. 1730; and, 2. That a plea of retention of a liquid debt, in security of an illiquid and uncertain claim, or for caution, was incompetent. The Court adhered.

D. Fisher,—Greig & Pedie, W. S.—Agents.

No. 725. W. Dennistoun and Others, (Elder's Trustees), Advocators.—*Gordon.*
C. Bell and G. Brown, Respondents.—*Colquhoun—Brown.*

March 10, 1824.

First Division. Bill-Chamber. Lord Eldin. H.

Common Property—Urban Tenement.—Dennistoun and others were proprietors, in trust, of the two upper floors of a house in North Frederick Street of Edinburgh, and Bell was proprietor of the under floors, which he sold to Brown to be converted into shops. To accomplish this, he proposed to fit up the two rooms on the dining-room floor as a shop and ware-room, the access to which from the street was to be by the present door and lobby; to strike out a door in the partition-wall of the lobby, and turn round a screen of columns situated in the centre of it; to widen the front windows four inches on each side; to take them down to the floor by cutting out the window breasts; to convert a Venetian window in the back main wall into an arched door, and to form doors in the walls within the house. Having applied to the Dean of Guild for authority to proceed with these operations, Dennistoun and others opposed them, on the ground, 1. That they were

of such a nature as to create a reasonable degree of alarm for the safety of the upper floors; and, 2. That in point of law their consent was essential, because they enjoyed a right in the inferior part of the tenement, partaking of the nature of common property and a legal servitude. To this it was answered, 1. That there was no reasonable apprehension of danger; and, 2. That they had no right of common property, but only a servitude of support, which could not prevent the proprietor from making alterations which did not destroy the servitude. The Dean of Guild granted warrant in terms of the prayer, in respect 'that the alterations in question can be performed without the least apprehension of danger to 'the property.' The Lord Ordinary refused a bill of advocation, and Dennistoun and others having reclaimed, the Court, before answer, remitted to Mr W. H. Playfair, architect, 'to consider 'the nature of the alterations proposed, and report whether any or what degree of risk may 'be incurred to the upper tenement by carrying 'the same into effect.' Mr Playfair having reported, 'that the said alterations may be carried 'into effect, due caution being used, without danger to the property above,' the Court adhered, and ordered the alterations to be made at the sight of Mr Playfair.

The Court were of opinion that the consent of Dennistoun and others was not necessary; that in such cases as this, the sole question was, whether the alterations were of a nature to be productive of danger

to the upper floors; and that it was on that ground that the case of Ferguson, (where the tenement was a century old, and six stories high) had been decided.

Advocator's Authorities.—(2.)—2. St. 7, 6; 2. Erek. 9, 11; 2. Bankt. 7, 11; Anderson, June 20, 1799, (12851); Reid, Nov. 16, 1799 (App. No. 1, Prop.); Sharp, Feb. 5, 1800, (No. 3. Ib.); Ferguson, Nov. 12, 1816, (F. C.); Rennie, June 5, 1819, (F. C.); Young & Co. Feb. 3, 1814, (F. C.); Sandy, Feb. 15, 1823, (ante, Vol. II. No. 196).
Respondent's Authorities.—2. Erek. 1, 2; Hall, Dec. 14, 1698, (13715); Robertson, Mar. 3, 1784, (14534).

J. ELDER, W. S.—CUNNINGHAM & BELL, W. S.—Agents.

No. 726. G. HUNTER, Suspender.—*Cockburn—Marc.* J. TURNBULL and A. PONTON, Respondents.—*Solicitor-General Hope—L'Amy.*

March 10, 1824.

FIRST DIVISION. Bill-Chamber. Lord Eldin. D.

Public Police—Process.—Hunter having obtained authority from the Dean of Guild to make some alterations on a tenement situated in Prince's Street, Edinburgh, lifted part of the foot-pavement opposite to it, and formed it on a different level. A complaint was then presented against him by the City Chamberlain, and by the Procurator-Fiscal, in consequence of which the Dean of Guild ordained him to restore the pavement to its original state; and failing his doing so within ten days, granted warrant to Turnbull and Ponton to do so at his expense. After the ten days had expired, Hunter presented a bill of suspension and interdict, alleging that the alteration had been made on the verbal order of the Dean of Guild. Turnbull, &c. objected, that a bill of suspension was incompetent against an interlocutor; and con-

tended, that the allegation was irrelevant. To the objection it was answered, that the bill was presented not against an interlocutor, but against a warrant capable of immediate execution; and that, as expenses were not decerned for, a bill of advocation could not be offered. The Lord Ordinary granted interdict and passed the bill, and the Court, after sustaining 'the competency of 'the present bill of suspension and interdict,' and on advising a condescendence, adhered.

The Court held, that this was not an ordinary interlocutor, but was a warrant, the execution of which required to be stopped by a bill of suspension and interdict.

W. Dickson, W. S.—M'Ritchies, Bayley & Henderson, W. S.—Agents.

A. Neilson, Petitioner.—*Monereiff—J. Miller jun.*
R. Anderson, (Neilson's Trustee), Respondent.—*Bell—Ivory.*

No. 727.

March 10, 1824.

First Division. D.

Inhibition.—Anderson, as trustee on the sequestrated estate of George Neilson, brought an action of reduction against his son, the petitioner, of a right to an heritable subject, on which he executed inhibition. The son alleging that the right had been granted by a third party to him, applied for a recall of the inhibition, and offered to consign the amount of the claims on the sequestrated estate. The Court refused the application as to

the subject under reduction, in respect of litigiosity, but granted it quoad ultra.

D. Greig, W. S.—Anderson & Whitehead, W. S.—Agents.

No. 728. J. Walker, Petitioner.—*More*—*D. Maitland.*
Mrs Walker, Respondent.—*Gordon.*

March 10, 1824.

Second Division M'K.

Pupil.—Walker, tutor-at-law to the eldest son of a deceased brother, applied to have him removed from his mother's custody, on the grounds, that having had a natural child since the death of her husband, the boy's father, she was an improper person to have charge of him, and that her place of residence was not calculated to afford the pupil proper means of education. The mother contended, that she was entitled to the custody of the pupil, or at least that he ought to be entrusted to the care of her brother, the nearest cognate, and who resided in the same place with her. The Court found that the petitioner was entitled

March 10, 1824.

First Division.

Alexander & Co. Appellants.—*Shaw.*
Boyd, Respondent.—*Donald.*

Stat. 24. *Geo. II. c.* 40.—*Tippling Act.*—Alexander and Company, wholesale and retail dealers in spirits, (but who do not sell them for consumption within their premises), sold several quantities of whisky, each under the value of 20s., and a bottle of wine, price 4s. 6d., to Boyd for domestic use. Having raised action for the amount, Boyd pleaded the tippling act in defence, which the Sheriff of Ayrshire sustained; and, on an appeal to the Court, Lord Succoth having certified the case, the Court altered as to the whisky, but deserned for the value of the wine, and found no expenses due.

No papers.

R. Dunlop, W. S.—C. Graham, —Agents.

to fix on a suitable residence for his pupil, and granted warrant accordingly.

The Court were of opinion, that the mother had disqualified herself for the custody of the pupil, and that, although the tutor-at-law is not entitled to the personal custody, he has the power of fixing the residence of his pupil, for the purpose of education, if there is no valid objection to the place chosen by him.

Petitioner's Authorities.—M'Ilvain, July 30, 1736, (16540); Scot, Feb. 16, 1758, (15401).

Respondent's Authorities.—1. Bankt. 7, 28; 1, Ersk. 7, 7; Reoch, Nov. 14, 1817, (F. C.).

W. Walker, W. S.—J. Gordon, W. S.—Agents.

Mrs A. Urquhart, Petitioner.—*Tawse.* No. 729.
Mrs M. Scott and Others, Respondents.—*Lamsden—et e contra.*

Factor loco Tutoris.—The late W. Scott died, leaving an infant daughter. There being no tutors nominate, and the tutor-at-law declining to act, the widow of the deceased on the one hand, and his sister and relations on the other hand, presented applications to the Court, for the appointment of a factor loco tutoris, each party recommending a person to the office. The Court, in consideration of the undue keenness manifested by each party for the appointment of their own candidate, remitted to the Sheriff to recommend a fit person, and thereafter appointed the person so recommended by him.

March 10, 1824.

Second Division M'K.

C. Tawse, W. S.—T. Deuchar,—Agents.

No. 730.

L. HILL, Suspender.—*M'Neill.*
C. CAMPBELL, Charger.—*Maidment.*

March 10, 1824.
SECOND DIVISION
Bill-Chamber.
Lord M'Kenzie.
M'K.

Jurisdiction—Small Debt Act.—Campbell, a labourer, raised action against Hill for payment of wages, as due him by the Merchant's House of Glasgow, of which Hill was collector. On the day of compearance, Hill sent one of his clerks to attend the court; but the Justices (according to his allegation, which was denied by Campbell) refused to hear him, as not being a member of Hill's family, and they decerned in favour of Campbell. Hill then applied to be reheard, as against a decreet in absence; which having been refused, he presented a bill of suspension. It was objected, that a suspension was incompetent under the small debt act; but to this it was answered, that the Justices had exceeded their powers, by refusing to allow Hill to be reheard, and pronouncing decree without his having been cited a second time, agreeably to the provisions of the act in cases of decrees in absence. The Lord Ordinary refused the bill as incompetent; but the Court altered, and remitted to pass the bill.

The Court were of opinion, that, as a clerk is not entitled to appear for a party before the small debt court, they must presume that the Justices refused to hear him, and that the decreet was in absence.

J. G. HOPKIRK, W. S.—J. GRAHAM, W. S.—Agents.

J. HORNE, Pursuer.—*Skene—Menzies.* No. 731.
P. REDPATH, Defender.—*Baird.*

Sale.—By missive of sale, Horne sold all the salmon he might catch during the season in his rivers of Beriedale and Langwell, to Redpath, 'at the rate of fifty-six shillings per hundred 'weight of 112 lbs.' Horne having raised action for the balance of the price of the fish delivered, calculating the weight by the English lb. of 16 ounces, Redpath pleaded in defence, that by local usage fish were uniformly weighed by the Dutch lb. of 17½ ounces, which must be held to have been the weight intended by the parties. It was answered, that the price stipulated being so much 'per cwt. of 112 lbs.' the English lb. must necessarily be understood, as the cwt. of 112 lbs. is never calculated by Dutch weight, 100 lbs. Dutch making a cwt.; and, besides, that Redpath had paid part of the price by the English weight. The Lord Ordinary decerned in terms of the libel, and the Court adhered.

March 10, 1824.
SECOND DIVISION
Lord Pitmilly.
B.

D. HORNE, W. S.—JOS. ORR,—Agents.

J. Cox, Advocator.—*More.* No. 732.
R. GILLIES and Others, Respondents.—*Skene.*

In a competition between Cox and Gillies, &c. relative to the price of certain goods poinded by the latter in the possession of A. & W. Cairns, their debtors, but which were alleged by Cox to belong

March 10, 1824.
SECOND DIVISION
Lords Pitmilly and M'Kenzie.
B.

to his debtors R. & J. Cairns, the Sheriff, on advising a proof, found that Cox had failed to prove the goods to be the property of his debtors, and dismissed his claim. Cox brought an advocation; but the Lord Ordinary and the Court, satisfied by the proof that the Sheriff's judgment was correct, remitted simpliciter.

J. W. M'Kenzie, W. S.—Campbell & Clason, W. S.—Agents.

No. 733. Young, Ross, Richardson & Co., Petitioners.—*Keay.*
W. Carrick, (Auchie & Co.'s Trustee), Respondent.

March 11, 1824. First Division. H. Decree applying the judgment of the House of Lords, reversing an interlocutor of the Court of Session, dated December 17, 1818.

J. Tennent, W. S.——Agent.

No. 734. Mrs Bogle of Gilfillan, and Husband, Petitioners.—*Cuninghame.*
Jean Brown and Husband, Respondents.—*Maitland.*

March 11, 1824. First Division. H. *Execution pending Appeal.*—Decree awarding interim execution pending appeal of the case, ante, Vol. II. No. 482.

A. P. Henderson.—W. Gibson, Agent.

Young, Ross, Richardson & Co. Pursuers.—*Buchanan.*
J. Ramsay, Defender.—*Keay.*

No. 735.

March 11, 1824.

First Division. Lord Meadowbank. D.

Tack—Acquiescence.—By a missive of tack in 1792, Morrison and Lindsay, papermakers, acquired a lease for fifty-eight years, from the Duke of Athole, of 'the paper-mill of Ruthven,' of which they took possession. Thereafter the pursuers having acquired the property of the barony, lands, and mill of Ruthven, and Morrison having died, they, in reference to the missive, executed in 1813 a regular lease in favour of Lindsay, of 'all and whole the paper-mill of Ruthven,' declaring that he and his successors were 'to be thirled to the mill of Ruthven, paying 'multures, conform to use and wont, for whatever quantity of corns they shall grind;' and binding them to uphold 'the mill, houses and 'machinery upon the lands let, and also any new 'erection he or they may make thereon, during 'the currency of this lease, in a sufficient workable condition, and to leave the same so at 'the issue of the tack.' In 1814, Lindsay assigned the lease to Stewarts, who converted the mill into an oil-mill, and employed it as such with the knowledge of the pursuers, till 1819. In that year, Stewarts assigned it to Ramsay, the defender, a flour-merchant, who took possession, removed the machinery, and fitted up the mill for the manufacture of flour. After it had been so employed for about a twelvemonth, the pursuers

brought an action, concluding to have it found that Ramsay was only entitled to use the mill for the manufacture of paper, and to ordain him to remove the machinery, and substitute that which was proper for a paper-mill. In support of this conclusion, they referred to the terms of the missive and tack, and to the clause of thirlage, which, they alleged, was directly violated by the erection of a flour-mill. Ramsay pleaded in defence, 1. That the term 'paper-mill' was merely descriptive, and that in long leases a tenant was entitled to convert the subject to any purpose not directly inconsistent with that for which it was let; that the conversion of a paper into a flour mill could not be prejudicial to the pursuers, because in both cases the resort was not to the mill, but to the manufacturer; that such a mill could not interfere with a corn-mill; and that he was willing to find caution to leave it at the end of the lease as a paper-mill; 2. That the pursuers had acquiesced for nine years in the mill being employed otherwise than as a paper-mill,—were perfectly aware that he had taken it as a flour-mill,—and knew that he had for that purpose removed the oil machinery. The Lord Ordinary found, 'that the alleged acts of acquiescence and homologation are not sufficient to exclude the pursuer from insisting in this process,' and therefore decerned in terms of the libel. But the Court unanimously altered, sustained the defences, and assoilzied the defender.

Pursuer's Authorities.—Mag. of Glasgow, Feb. 11, 1813, (F. C.); Ford, May 20, 1808, (No. 17. Ap. Tack).

Defender's Authorities.—Aytoun, May 19, 1801, (No. 1. Ap. Prop.); E. of Kinnoul, Jan. 18, 1814, (F. C.)

H. T. PATTON, W. S.—J. THOMSON, W. S.—Agents.

J. GILLESPIE, Suspender.—*Keay.*
A. P. ROBERTSON, Charger.—*Solicitor-General Hope—More.*

No. 736.

March 11, 1824.

FIRST DIVISION.
Bill-Chamber.
Lord Eldin.

Res Judicata—Feudal Title.—William and Robert Robertson, partners in trade, purchased from Ewing and Roger an heritable subject, which was disponed 'to and in favour of the said William and 'Robert Robertson, according to their said inte-'rest in the said Company, and to the survivor, for 'behoof of himself and the heirs of the deceaser, 'and to his disponee, heritably and irredeemably.' After infeftment had been taken, William disponed his share mortis causa to his two sons, and soon thereafter died. These sons afterwards executed a deed, by which they declared 'the foresaid 'subjects to be the sole and exclusive property 'of the said Robert Robertson.' On the death of Robert, his eldest son, the charger raised a declaratory adjudication, in which he obtained decree, finding that the trust held by his father for the heirs of his brother William was extinguished, and that the property now belonged absolutely to him; and he then made up titles by precept of clare constat. Prior to Robert's death, Gillespie had bound himself by missives to purchase the property; and on these the charger obtained a decree against him, (see ante, Vol. II.

No. 398.) A charge having been given, Gillespie suspended, alleging that the charger's title was inept, because the pro indiviso share belonging to William ought to have been taken out of his hæreditas jacens, by Robert the survivor expeding a service to him, as heir of provision under the investiture. To this it was answered, 1. That the suspension was incompetent, as the plea had been proponed and repelled; and, 2. That the title was unobjectionable. The Court, on the report of the Lord Ordinary, refused the bill.

The Court were satisfied that the title had been correctly made up, and that the case of Drummond was a precedent in point.

Suspender's Authorities.—2. Craig, 3, 19; 3. Ersk. 8, 35; Riddell, Nov. 6, 1747, (14878); Bisset, Nov. 26, 1792, (No. 2, Ap. Dentbbed). *Charger's Authority.*—Drummond, June 30, 1758, (16206).

G. Dunlop, W. S.—J. Robertson, W. S.—Agents.

No. 737.

M. Sanders, Pursuer.—*A. M'Neill.*
Thistle Bank Company, Defenders.—*Bosnell.*

March 11, 1824.

First Division. S.

Cessio.—Decree of cessio was here opposed, on the ground, 1. Of the irregularity of the process; and, 2. Of fraud. The Court refused it in hoc statu.

R. Kennedy, W. S.—J. M'Andrew, Agent.

W. JAFFRAY, Petitioner.—*Cockburn—J. Wilson junior.*
W. M'LURE, Respondent.—*Jeffrey—A. M'Neill.* No. 738.

Inhibition.—The Court, in the circumstances of this case, recalled an inhibition executed by M'Lure, on an action against Jaffray for £. 1000 of damages, as a solatium for slander, on caution for L. 200. March 11, 1824. FIRST DIVISION. H.

W. MERCER, W. S.—R. KENNEDY, W. S.—Agents.

J. DUN, Suspender.—*Gillies—Inglis.*
M. CRAIG, Charger.—*Cuninghame—Ivory.* No. 739.

Landlord and Tenant.—Precept of Warning.—Writ.—Dun possessed the farm of Ballewan, by tacit relocation. In March 1823, he was served by Craig, his landlord, with a precept of warning to remove at the Martinmas following; and a decree of removing founded on it was obtained and extracted in September thereafter. The farm was then advertised to be let, and Dun offered for it, but was unsuccessful. Craig having charged him to remove, he presented a bill of suspension, on the grounds, 1. That the precept, which was written bookwise on the four pages of a single sheet, was null, the last page only being subscribed; and, 2. That the execution, which bore the copy to have been served on a Saturday, was inept, the service, (as he alleged,) having actually taken place between twelve and one o'clock of March 11, 1824. SECOND DIVISION. Bill-Chamber. Lord Eldin.

Sunday morning. The Lord Ordinary refused the bill, 'in respect that the precept of warning 'is ex facie regular and unexceptionable, and that 'a decree of removing followed upon it, which is 'also ex facie regular and unexceptionable, and 'that a charge followed on said decree, and that 'no objection was stated to these proceedings 'till after the charge was given; and that the objections now stated by the complainer, and offered to be proved by parole evidence, against 'the precept of warning, are incompetent in a 'suspension of the decree of removing and charge 'thereon.' The Court adhered.

T. Megget, W. S.—Gibson, Christie & Wardlaw, W. S. —Agents.

No. 740.

J. Barbour, Pursuer.—*Gillies.*
J. Smith, Defender.—*Maitland.*

March 11, 1824.

Second Division Lord Cringletie. M'K.

Expenses.—As a preliminary defence to an action raised by Barbour against Smith, for reduction of a bill of exchange, it was stated, that the representatives of one Maxwell, who was a party to the bill, had not been called as defenders. After some procedure, a summons was raised against these parties, and the Lord Ordinary, on a claim subsequently made by Smith, found 'him entitled 'to the expenses which were incurred previously to the action's becoming an efficient action, 'by bringing Mr Maxwell's representatives into 'Court; and upon payment of these expenses, 'allows the pursuer to put into process such do-

'cuments as he may think necessary in support 'of his action.' The Court refused a reclaiming petition, without answers, reserving, however, to the pursuer all claims for repetition, in the event of his ultimate success.

W. Dalrymple,—W. Dickson, W. S.—Agents.

A. Waddell, Pursuer.—*Christison.* No. 741.
Mrs M. Pender, and Others, Defenders.—*Handyside.*

March 11, 1824.

Second Division
Lord M'Kenzie.

Expenses.—In an action at the instance of Waddell, against Mrs Pender, &c., in which he had, in a great measure, failed, but partly succeeded, the Lord Ordinary found him liable in modified expenses, and the Court adhered.

B.

Ainslie & M'Allan, W. S.— ——— —Agents.

DECISIONS

OF THE

COURT OF JUSTICIARY,

FROM

NOVEMBER 1822.

HIGH COURT OF JUSTICIARY.

ELIZABETH STEWART, Petitioner.—*Lumsden.* No. 81.

Liberation.—Stewart was convicted at Aberdeen in 1813, of theft and housebreaking, and sentenced to two years imprisonment, and thereafter, until she should find caution to keep the peace, and for her good behaviour, for two years from the date of her liberation. Having remained seven years in prison, from inability to find caution, she petitioned the Court for liberation. The Lords, "in respect the petitioner has remained in confinement during more than two years after the expiry of the period of imprisonment awarded against her, find, that it is not necessary for her to find caution, and therefore grant warrant, &c. to set her at liberty." Nov. 12, 1822.

No. 82. ARCHIBALD ORMAND.—*Donald—A. M'Neill.*

Dec. 9, 1822. *Witness—Designation.*—On the trial of Ormand for theft, the prosecutor adduced a witness, designed "Thomas Somerville, residing in Wellington Street, parish of St. Cuthberts, and county of Edinburgh." It appeared that he had been imprisoned for debt about two months prior to the service of the indictment on the pannel, and that during that period, a term of removing had intervened, but his family continued to inhabit his house in Wellington Street. An objection was taken to his designation, that he did not reside in Wellington Street, but was repelled by the Court.

No. 83. CHARLES M'LAREN and Others.—*Donald—A. M'Neill.*

Jan. 11, 1823. *Witness—Designation.*—In the course of the trial of M'Laren and others for theft and housebreaking, there was adduced by the prosecutor, a witness, "Jean Mortin, now or lately servant with Arthur and Colquhoun, publicans, Dow's Close, High Street of Edinburgh." It was objected to the designation of this witness, "that, in point of fact, she has not resided with Arthur and Colquhoun since the last term of Martinmas, nor for a considerable time prior to that term. It was answered, that the witness had been servant with Arthur and Colquhoun up to the Whitsunday preceding, and that the phrase, "now or lately," embraces the whole period of the preceding term." The Court repelled the objection.

Pannel's Authority.—2. Hume, 361.

HOUSTON CATHIE.—*Hunter—Constable.* No. 84.

Jan. 27, 1823.

Reset of Theft, with Aggravations.—Cathie was accused of reset of theft, aggravated by his being habit and repute a thief, and having been previously convicted of theft, and habit and repute a resetter of stolen goods. An objection having been taken to the relevancy of these aggravations, the Court ordered informations, and thereafter found, "that the aggravations of the charge of reset of theft stated in the indictment are not relevant."*

The Court were of opinion, that the aggravation of "habit and repute" can only be admitted in the case of theft, and that no crime can be charged as aggravated by a previous conviction of another crime.

Prosecutor's Authorities.—Thomas Porteous, Nov. 15, 1498; Edward Johnson, May 25, 1513; and several other old cases quoted from the record in the Crown Information, pp. 8–21; W. Morganach, Sep. 13, 1766; (at Inverness), J. Lyle, Oct. 5, 1767; (at Glasgow), J. and G. Bell, June 2, 1736; 1. Hume, 112–5–6; Burnet, p. 130.

Pannel's Authorities.—Stewart and Gordon, March 14, 1785; J. Hamilton, Jan. 13, 1811; W. Monteith, July 12, 1819; G. Buckley, July 12, 1822; (Ante, No. 65); 1. Hume, 115; Burnet, 128.

A. ROLLAND, W. S.—J. B. GRACIE, W. S.—Agents.

* Taken from the papers.

No. 85. P. JARDINE, Advocator.—*Cockburn—Christison.*
A. SIMPSON, Respondent.—*Jeffrey—Hope.*

Jan. 27, 1823. *Title to Pursue—Jurisdiction—Record.*—Simpson, the procurator-fiscal of the city of Glasgow, (who was not a member of the faculty of procurators of Glasgow,) presented a complaint to the Magistrates against Jardine, and about 640 other dealers in wine and spirits, for using false measures. The record of the court bore, that Jardine, &c. having appeared, " and the complaint having been read over to them, they severally acknowledged the matters therein charged," and were fined accordingly.—Of this judgment, Jardine presented a bill of advocation, on the ground, 1. That Simpson, not being a member of the faculty of procurators of Glasgow, was prohibited by the charter of that body from practising before any of the courts of that city; 2. That there had been certain irregularities in the procedure in the inferior court; 3. That it was incompetent to bring the complaint before the Magistrates, instead of the Dean of Guild; and, 4. He contended, that not having been required to sign his admission, the mere record of the court was not sufficient evidence of his having done so, and that his verbal admission was not a sufficient warrant for the judgment pronounced. The Court repelled the objection against Simpson, in respect that he, as a party, was entitled to conduct his own case, without the intervention of a procurator; held that the record in a case of this nature afforded sufficient evidence, without the signature of the party;—that Jardine was barred from objecting either to the

jurisdiction or to the regularity of the process; and, therefore, dismissed the advocation.*

W. Renny, W. S.—D. Fisher,—Agents.

Charles M'Laren and Others. No. 86

Feb. 10, 1823.

Power of the Court to Respite Execution.—The Lord Justice-Clerk represented to the Court, that he had, in obedience to his Majesty's command, transmitted to the Secretary of State, a full report of the case of M'Laren, &c. sentenced to be executed on the 12th current, with the recommendation of the jury, in favour of M'Ewan; and he had no doubt but that he would have received a notification of the royal will with regard to these persons, but for the delay of six mails, owing to the unprecedented state of the roads, in one of which, he had reason to believe, the answer to his report was contained. "The Lords, in respect of this representation, prohibit and discharge the execution of the sentence of death, pronounced on the said Charles M'Laren, &c. until Wednesday the 20th day of February current, and, upon that day, grant warrant to the Magistrates of Edinburgh, to carry the said sentence into execution, in terms of the original warrant."

* Taken from the papers.

No. 87. MATTHEW STEELE and ROBERT SMELLIE.—*Cockburn —Fletcher.*

Feb. 10 1823. *Perjury and Subornation of Perjury.—Act 54. Geo. III, c. 137.*—At the Glasgow Spring Circuit of 1822, Steele and Smellie were charged, "That albeit, &c. perjury, as also subornation of perjury, are crimes of an heinous nature, and severely punishable; and albeit, by an act made in the 54th year of the reign of his late Majesty, King George III, cap. 157, entitled, &c. it is inter alia enacted, that in case any creditor shall be guilty of false swearing in any oath, to be emitted in pursuance of this act, he shall be liable to a prosecution, at the instance of the trustee or any of the creditors, and of his Majesty's Advocate, for perjury, and shall also forfeit to the trustee, for behoof of the creditors, the whole dividend on his debt. Yet, true it is, &c. that you, the said Matthew Steele, are guilty of the said crime of perjury, actor or art and part; and you, the said Robert Smellie, are guilty of the said crime of subornation of perjury, actor, or art and part: In so far, as" "you, the said Matthew Steele," "did falsely swear to an affidavit, in presence of a Magistrate, bearing, that Smellie was indebted, and owing to the deponent the sum of £199," for the purpose of concurring with Smellie in an application for sequestration of his estate, which was granted, in consequence of this false affidavit; "and, in so far as you, the said Robert Smellie, did, within the house, &c. wickedly and feloniously solicit, entice, and fraudulently seduce" the said Matthew Steele, "deliberately and wilfully, to commit the crime of perjury, by swearing, contrary to the fact," that he had a debt of £199 against your sequestrated estate. To the

relevancy of this indictment it was objected, 1. That in so far as it was laid on the statute, it was inept, as it did not state Steele to have been a creditor of Smellie. 2. That the Lord Advocate had no title to prosecute alone under the statute, but must have the concurrence of the trustee or a creditor. 3. In so far as the indictment libelled on the common-law, that the swearing falsely to the affidavit of a claim on a bankrupt estate, did not amount to the common-law crime of perjury; and, 4. That the charge of subornation was not sufficiently specific, as it did not state the manner in which Steele was enticed to commit the perjury, or any facts from which it could be inferred; but simply, that he did "solicit, entice, and fraudulently induce" him to commit perjury. The case was certified to the High Court on informations. The Lords pronounced this interlocutor:—"Find, that the indictment, so far as it is laid on the statute libelled on, is not relevant, in respect it does not state that the pannel, Matthew Steele, was a creditor of the bankrupt, Robert Smellie, but repel the whole other objections to the charge under the statute; find the said indictment, in so far as it charges the crime of perjury at common-law, relevant to infer the pains of law, and find, that the charge of subornation of perjury, contained in the indictment, is not relevant as laid."

Prosecutor's Authorities.—(3.) 1. Hume, 364–8; Burnett, 205–6.
Pannel's Authorities.—(1.) 2. Hume, 150; (4.) 2. Hume, 184–5; M'Intosh, v. Dempster, M'Laurin, p. 582.

A. Rolland, W. S.—Greig & Peddie. W. S.—Agents.

No. 88. JOHN BRAID, alias JOHN BAIRD.—*Smythe.*

Feb. 24, 1823. *Designation of Pannel—Bigamy.*—Braid alias Baird, was indicted for bigamy, by "having, in the month of May, 1811, or in one or other of the months of that year, been lawfully married to Ann Henderson, daughter of Archibald Henderson, &c. and having cohabited with the said Ann Henderson, as your wife, for several years, &c. and the said marriage still subsisting," he had married another woman. It was objected to the citation, that the pannel had never been called Baird; but that Braid was his true name; and to the relevancy, that the indictment did not specify the place where, nor the manner in which the first marriage was constituted. The objection to the citation was repelled, but that to the relevancy sustained; and the indictment dismissed.

Pannel's Authorities.—(Citation), James Bryce, alias Wight, 2. Hume, 152.

No. 89. JOHN BAILLIE.—*Jardine.*

May 19, 1823. *Punishment—Perjury.*—Baillie having been convicted at the Glasgow Spring Circuit, of perjury, by falsely swearing to a claim on a sequestrated estate, the judges certified the case to the High Court, to decide as to the punishment. He was declared infamous, and sentenced to be transported for seven years.

JAMES ALEXANDER.—*Monteith.* No. 90.

Written Verdict.—James Alexander, designed in the indictment, "now or lately weaver at Flemington, in the parish of Avondale, and county of Lanark," was tried at the Glasgow Spring Circuit, for assault. The jury returned a written verdict, bearing, "that having considered the criminal indictment raised, &c. against James Alexander, present prisoner in the tolbooth of Hamilton, pannel, &c. they, by a plurality of voices, find the pannel guilty of the assault libelled." Monteith stated, in arrest of judgment, that the verdict did not apply to the pannel, or to the indictment to which he pleaded, the pannel never having been prisoner in the tolbooth of Hamilton. The jury being still in the box undischarged, were asked by the Court, if the pannel at the bar was the person whom they found guilty of assault, and they answered, all in one voice, that he was. The case having been certified, it was contended for the pannel, that where a written verdict was necessary, (as it was in this case, the jury not being unanimous), every part of it must be written, nor could it be amended by a verbal statement. The Court repelled the objection. May 19, 1823.

JAMES QUIN and JOHN M'CABAL.—*Tait.* No. 91.

Pannel's Copy of List of Assize.—At the Glasgow Spring Circuit, Tait objected, that the list of assize served on the pannels, Quin, &c. was incomplete, in so far as although it bore to be a copy of the attested double of the list of assize, it did May 26, 1823.

not copy the attestation by the clerk of Court, which forms part of the attested double, and alone proves its correctness. The case having been certified, the Lords repelled the objection.

No. 92. JAMES BODAN.—*Fergusson—Napier.*

May 26, 1823. *Locus Delicti—Specification of.*—At the Ayr Circuit, Brodan was indicted for eleven acts of theft, ten of which were charged to have been committed in gardens behind certain houses "in Wigton," and the eleventh in the Bridge Vennel of Wigton. An objection was taken to the specification of the *locus* delicti in each of these charges, that a house "in Wigton" was an indefinite description, and might mean either in the town, or the parish, or the county of Wigton. The case was certified, and the Lords "sustained the objection, excepting to the locus delicti, as stated in the eleventh charge."

Prosecutor's Authorities.—Cases in II. Hume, 205-6.
Pannel's Authority.—II. Hume, 203, &c.

No. 93. WILLIAM RUSSEL and Others.—*Cockburn—Tait.*

May 26, 1823. *Jurisdiction.*—Russel and others were indicted at the Glasgow Circuit for culpable homicide, by having, from carelessness in directing the course of a steam boat, of which they had the charge, in the Firth of Clyde, on a voyage from Iona to Greenock, run down a small boat, whereby it was sunk, and several persons who were in it, drowned. It was objected, that this was a maritime offence, which did not fall within the jurisdiction of the Court of Justiciary. The

case was certified, and the Court sustained the objection to the jurisdiction.

Pamel's Authority.—2. Hume, 35–7.

WILLIAM CALDERWOOD.—*Fergusson.* No. 94.

Deforcement—Punishment.—Calderwood was convicted at Ayr, of deforcing officers of the law. The case having been certified as to the punishment, the Court sentenced him to six months imprisonment, and to find security to keep the peace for five years. June 2, 1823.

ALEXANDER MARTIN.—*Menzies—Cheape—Smith.* No. 95.

Witness.—On the trial of Martin for rape, the prosecutor adduced as a witness, Christian, a deaf and dumb woman. The Court, after examining several witnesses as to her capacity to give evidence, found, "that she was of sufficient capacity to be examined as a witness, and allowed her to be sworn and examined by means of interpreters." June 13, 1823.

CIRCUIT COURT OF JUSTICIARY.

NORTH CIRCUIT.

No. 96.

JOHN PROUDFOOT.—*Keay—Smith.*

PERTH.
April 4, 1823.

Lords Justice-Clerk and Pitmilly.
Alison, *A. D.*

Citation of Witness.—On the first witness being called on the trial of Proudfoot, for murder, it was objected to his citation, and that of the other witnesses, that when they were cited, the messenger had no warrant to cite on his person. The Lords sustained the objection.

No. 97.

WILLIAM WILSON.—*G. Grant—Neaves.*

ABERDEEN.
Sept. 19, 1823.

Lord Gillies.
M'Neill, *A. D.*

Designation of Witness.—On the trial of Wilson for assault and deforcement, the prosecutor adduced as a witness "Andrew Wright, now or lately carter in Cullen, in the parish of Cullen;" objected, "that the witness now resides in a different place and parish, and that the alternative "lately," does not remove the objection, as the witness had ceased to reside at the place mentioned in the list previous to the term of Whitsunday immediately preceding the service of the list." Repelled.

WEST CIRCUIT.

MARTIN M'INTYRE.—*A. M'Neill.* No. 98.

INVERARY. April 14, 1823. Lord Succoth. Dundas, *A. D.*

Citation of Witness.—John Downie having been adduced as witness, it was objected, "that the messenger's execution bore, that he had passed, by virtue of the Porteous-roll of the county of Argyle, and Sheriff's precept thereon," &c.; and that, therefore, the warrant to cite, which was the precept on the Porteous-roll, and not the Porteous-roll itself, was not properly specified in the execution. Lord Succoth repelled the objection.

JOHN FORREST.—*R. Thomson.* No. 99.

STIRLING. April 19, 1823. Lord Gillies. Dundas, *A. D.*

Outlawry—Pannel furth of the Kingdom—Mandate.—John Forrest, accused of violating the sepulchres of the dead, having failed to appear, on calling the diet against him the Advocate-depute craved sentence of fugitation. "Thomson objected to the regularity of the citation, that it was not given at the last dwelling-place of the pannel; and, moreover, that as the pannel was forth of Scotland, an edictal citation ought to have been used. The Advocate-depute answered, that the counsel for the pannel was not entitled to state this objection, because the pannel did not appear, and because the counsel did not hold a mandate from him, which was necessary, he being forth of the kingdom." Lord Gillies repelled the objection, and sentence of outlawry passed against the pannel.

No. 100. JOHN COOK and Others.—*H. Bruce.*

STIRLING.
April 19, 1823.
Lord Gillies.
Dundas, *A. D.*

Execution of Citation of Pannel.—On Cook, &c. being brought up for trial, it was objected, that the execution of the messenger did not specify that each page of the libel served upon the pannels was subscribed by the messenger; and that, at the time of serving the indictment, the messenger was not possessed of the warrant on which he proceeded.—Sustained.

No. 101. JOHN THOMSON and Others.—*Dickson.*

STIRLING.
April 21, 1823.
Lord Gillies.
Dundas, *A. D.*

Pannels' Copy of Criminal Letters.—Objected, that the copy of the criminal letters served upon the pannels did not bear that the letters were subscribed by the clerk of the High Court of Justiciary.—Sustained.

No. 102. JOHN THOMSON.—*A. M'Neill.*

GLASGOW.
April 24, 1823.
Lords Gillies and Succoth.
Dundas, *A. D.*

Citation of Witnesses.—On the trial of Thomson for theft, M'Neill objected to the citation of Kerr and other witnesses, "that the execution of citation bore that the messenger, "by virtue of letters of supplement, &c. raised on the indictment contained in the Porteous-roll," &c. summoned the witnesses; and he contended, that, as the indictment itself was no warrant on which a witness could be summoned, a supplement raised on the indictment must be equally insufficient." Answered, "that there was no doubt but that letters of supplement had been regularly issued. The only question was, whether the

messenger had given so inaccurate a description of his warrant, as to vitiate his execution, and prevent its application to the document lodged in process. That letters of supplement truly proceed on the indictment, as they relate to that particular case, and proceed on the narrative, that certain witnesses, necessary for proving it, live without the jurisdiction. But, at any rate, if there was any ambiguity in the first part of the execution, the defect was remedied by what follows.—" In his Majesty's name and authority, in supplement of the precept, &c. summoned," &c. The Lords repelled the objection.

COLIN CAMPBELL.—*C. Fergusson.* No. 103.

INVERARY. Sept. 13, 1823.

Lord Hermand. Alison, *A. D.*

Malicious Mischief, aggravated by Housebreaking.—Campbell was accused of malicious mischief, aggravated by housebreaking. On an objection taken to the relevancy, Lord Hermand found " the indictment, in so far as it charges the crime of malicious mischief, relevant to infer the pains of law; but finds, that the aggravation of housebreaking, as libelled, is not relevant."

EDWARD M'CAFFER and Others.—*Monteith.* No. 104.

GLASGOW. Sept. 23, 1823.

Lords Justice-Clerk and Hermand. Alison, *A. D.*

Amendment of Libel.—M'Caffer and others were indicted for robbery committed " on the footpath of the road leading from Shawfield toll to Little Govan, in the parish of Gorbals, and county of Lanark." Before the pannels pleaded to the indictment, the Advocate-depute moved that the words " parish of Gorbals, and," in the description of the

locus, be struck out of the indictment. Monteith, for the pannels, objected, and contended, that, although the prosecutor might strike out any one charge from his libel, he was not entitled, when the case was called, to make any alteration in the description of the charge for which he intended to try the pannels. The Court allowed the words to be struck out.

No. 105. WILLIAM KANE.—*Cowan.*

GLASGOW. Sept. 24, 1823.

Lords Justice-Clerk and Hermand. Alison, *A. D.*

Designation of Pannel.—"At calling the diet against W. Kane, Cowan objected, that the pannel was not bound to answer to the indictment, in respect his real name was Cain, and not Kane." Answered, "in the pannel's declaration he is designed Kane, and the variation is similar to Dalrymple and Darymple, or Robinson and Robertson, which have been found not sufficient to cast an indictment in several cases; 2. Hume, 153." The Lords sustained the objection.*

No. 106. W. WHITE, L. PHILLIPS, and Others.—*A. M'Neill.*

GLASGOW. Sept 26, 1823.

Lords Justice-Clerk and Hermand. Alison, *A. D.*

Specification of Articles Resetted.—White was accused of stealing, and Phillips of resetting, sundry articles. On the part of Phillips, it was objected, "that she is charged with having resetted, *inter alia*, a gold amethyst ring, and a pair of pearl ear-rings, which articles are not previously specified as having been stolen." It was answered, "that, in the charge

* In the above case the declaration was not signed by the pannel.

of theft, there is a specification of three dozen gold rings, and several pairs of gold ear-rings, which, it was contended, was sufficiently specific to embrace the articles objected to." The Lords sustained the objection, and ordained the articles objected to by the pannel, to be expunged from the indictment.

SOUTH CIRCUIT.

No. 107 JAMES CONNACHER.—*Marshall—Napier.*

AYR.
April 14, 1823.

Lords Hermand and Meadowbank.
M'Neill, *A. D.*

Declaration.—In the trial of Connacher for murder, his declaration having been offered in evidence, it was objected, "1. That it did not bear that the pannel was in his sound senses at the time of his examination; and that the magistrate before whom it was emitted, has stated on oath, that he purposely omitted to state, in the conclusion of the declaration, that the pannel was then in his sound senses, because he did not think he was then sound in his mind, from the answers he gave, and the manner in which he conducted himself while under examination; and, 2. That the magistrate had admitted, that the whole of what the declarant had said, was not taken down in the said declaration." "The Lords, in respect of the terms of the depositions referred to in the objection, sustain the objection, and refuse to allow the declaration to be read."

No. 108. WILLIAM AFFLECK.—*Fergusson—Blair.*

AYR.
April 14, 1823.

Lords Hermand and Meadowbank.
M'Neill, *A. D.*

Designation of Pannel.—On calling the diet against Affleck, designed "present prisoner in the tolbooth of Ayr," it was objected, "that the pannel had never been prisoner in the tolbooth of Ayr, excepting for about half an hour on the 15th September last." Sustained.

WILLIAM BROWN.—*Fergusson—Napier.* No. 109.

AYR.
April 14, 1823.

Lords Hermand and Meadowbank.
M'Neill, *A. D.*

Designation of Pannel.—Brown, designed as "residing near Galloway burn, parish of Ballantrae, and shire of Ayr," being brought up for trial, it was objected, that he resided in the parish of Inch, and shire of Wigton, which being instantly verified, the Lords sustained the objection.

JAMES YOUNG and Others.—*Napier.* No. 110.

AYR.
Sept. 6, 1823.

Lord Succoth.
Dundas, *A. D.*

Proof.—On the trial of Young, &c. for assault, with intent to ravish Mary Muir, the person on whom the assault was committed, having been examined as a witness for the crown, the counsel for the pannel thereafter called William Kenneth as a witness in exculpation, and asked him "whether Mary Muir had, at any time in April, told the witness, that she had not been very ill used by the pannel, James Young." The advocate depute objected to the question, "that Mary Muir having already given her testimony on oath, the pannels cannot now be allowed to invalidate and contradict that testimony." Lord Succoth repelled the objection, and allowed the question to be put.

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ERRATA.

No. 47. p. 48. (line 9.)—after "complained" insert—*by bill of Suspension.*
—— 55. (title) for Sir J., read *Sir S.*
—— 62. p. 62. (line 2.) for 1695 read 1696.
—— 72. p. 76. (line 15.) for L. 88, read L. 28.
—— 86. p. 91. (line 8.) for create, read *created.*
—— 90. (title) for 'J. Gibson,' read *J. Gordon.*
—— 93. p. 97. (lines 11. and 12.) for 'ordered but failed,' read *held not bound.*
—— 113. p. 117. (line 5.) for 'oath of,' read *oath and.*
—— 142. p. 151 (line 19.) after 'examination,' insert *and.*
—— 285. p. 308. (line 3.) for *arrestee* read *arrester.*
—— 324. p. 350, insert as the title *Sale.*
—— 358. p. 377, for T. Vans read J. Vans.
—— 437. p. 456. *N. B.* This case not final,—a short pro forma petition having been lodged, which was not observed, till after the case was printed.
—— 436. p. 455. *N. B.* The Court passed the Bill.
—— 685. p. 705. (line 22.) before "mere" introduce *of.*
—— 689. p. 753. (title) for Jurisdiction, read *College of Justice.*